

When Rights Don't Talk: Abortion Law and the Politics of Compromise

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ABSTRACT: This Article draws attention to the significance of rights-talk in shaping proper abortion legislation. It engages with ongoing debates regarding the wisdom of *Roe v. Wade*'s judicially imposed, strict rights-based approach to legal abortion. As the issue of abortion remains extremely controversial in American politics, it has been argued that the Supreme Court's rights-based rhetoric, coupled with its "undemocratic" judicial imposition of a resolution to the issue, played a central role in triggering the ongoing conflict over abortion. Legal scholars often rely on comparative examples in an attempt to argue in favor of legislative and conciliatory policy solutions to the issue of abortion.

This Article questions the superiority of legislative solutions to abortion by providing a critical comparative account of abortion legislation that seems to exemplify precisely the sort of compromise-based solution advocated by critics of *Roe v. Wade*'s judicially created right to abortion. It critically analyzes the give-and-take process in the Israeli legislature that gave birth to the country's abortion law. The Article argues that the Israeli case study provides a cautionary tale of a legal system in which abortion regulation was decided exclusively by legislators, rather than judges, which resulted in legislation devoid of any concept of individual rights.

The Article concludes by exploring a number of additional comparative examples outside of Israel. Focusing specifically on Canada, Germany, and France, it illustrates how a broad comparative perspective is useful in drawing attention to the roles of courts and legislatures in shaping abortion policies, as well as to the disguised costs of abortion compromises.

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INTRODUCTION

*"Opposition to the Law based on the demographic problem is irrelevant. . . . It is likely that following the Law's enactment, the overall number of abortions will decrease, as the medical committees will have no interest in approving numerous abortions unless doing so is justified according to the criteria provided by the Law. There will always be fewer abortions approved than sought. Contrary to the current situation, in which 60,000 abortions are performed illegally, there may be only 20-30 thousand legal abortions. The proposed bill does not seek to decrease the birthrate, but vice versa."*¹

In 1973, when the United States Supreme Court announced its decision in *Roe v. Wade*,² Israel started debating the potential for reforming its own abortion laws, left over from the British Mandatory period. While experiencing the same cross-national trends toward abortion reform that occurred in the 1970s,³ the two countries ended up taking different paths to addressing the abortion issue. As

1. DK (1977) 1229 (Isr.) (statement of MK Chaika Grossman).

2. *Roe v. Wade*, 410 U.S. 113 (1973).

3. Within a period of twenty years, between 1967 and 1987, numerous Western European countries abandoned strict anti-abortion laws through legislative reform. For a comparative analysis of these reforms, see MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987). For additional comparative data and specific country analysis, see *THE NEW POLITICS OF ABORTION* (Joni Lovendusky & Joyce Outshoorn eds., 1986).

opposed to *Roe*'s judicially imposed, strict rights-based approach to abortion, Israel's 1977 abortion law reform was the product of a legislative compromise that conceptualized the need for abortion reform in terms that were at odds with any concept of individual rights. The primary motivation for reform in Israel was the desire to remedy the demonstrated dysfunction of the country's first abortion statute. This law, which originated in British Mandatory legislation, criminalized the performance of all abortions. However, the relevant figures at the time indicated that the law was mostly ignored and that black market abortions flourished. These figures were a source of particular demographic anxiety for policymakers and legislators concerned with the small size of the Jewish population in the newly established country.⁴ In reforming the old abortion law, legislators sought to introduce a measure of governmental control into an area in which legal norms had largely ceased to matter. The assumption was that a more realistic and enforceable legal framework would be effective in restricting some abortions and consequently in protecting the country's vital national interest in population growth.

It was within this context that Chaika Grossman, one of the very few female members of the Israeli Parliament (Knesset) in 1977, addressed the "demographic issue" when introducing a proposed outline for a new abortion bill. Grossman, chairperson of the Public Services Committee that formulated the proposed bill and a strong advocate for women's rights, eschewed any rights-talk in her proposal. As part of her efforts to convince her fellow Members of Knesset (MKs)—most of them conservative secular and religious men—to endorse the proposed abortion reform, Grossman formulated her arguments in language that sought to assuage their national and demographic concerns. In the absence of a constitutional bill of rights and in light of the general marginality of the Israeli feminist movement,⁵ individual rights-based arguments for reproductive freedoms had little resonance in public discourse. In the parliamentary deliberations surrounding this bill, most Members of Knesset drew a direct link between the appropriate scope of the proposed abortion reform and the goal of promoting "the natural population increase in Israel."⁶ Even while supporting a reform that would legalize abortions based on a broader array of grounds than the country's first abortion statute, Members of Knesset did so through a discourse centered on the interests of the Jewish-Zionist collective. They were motivated by the assumption that such a reform would increase the birthrate among middle-class Jewish women on the one hand, and control the fertility of the less privileged

4. Yael Yishai, *BETWEEN THE FLAG AND THE BANNER: WOMEN IN ISRAELI POLITICS* 212-13 (1997).

5. The feminist movement in Israel started to organize in the early 1970s, a decade after the rise of second-wave feminism in the United States. The early years were characterized by a lack of organizational resources and public legitimacy that hindered the movement's ability to push forward its vision of gender equality. For further elaboration of the emergence of the feminist movement and the sources of its relative marginality in those years, see *infra* notes 31-34, 43-50 and accompanying text.

6. DK (1977) 1232 (Isr.).

Jewish sectors of the community on the other hand. Hence, MK Grossman's assertion that the proposed bill "d[id] not seek to decrease the birthrate" was part of her efforts to articulate the rationale for abortion reform in terms that reflected the national consensus on the importance of population growth. MK Grossman's ultimate goal was to guarantee passage of the bill by obtaining a majority vote; her strategy proved effective.

After a lengthy and acrimonious political debate, the law was approved in 1977 and went into effect in 1978. As opposed to the old law that imposed an absolute ban on abortions, the new law authorized Abortion Termination Committees to approve abortions under at least one of five circumstances, including a woman's social environment and economic circumstances. Proponents of the abortion reform considered the socioeconomic ground for abortion to be especially significant in terms of expanding women's legal access to abortion. The new law also held the promise of greater public funding for abortion. In this respect, Chaika Grossman and other feminist MKs who sponsored the new legislation were successful in facilitating legal access to some abortions that could not have been secured otherwise. This was achieved, however, through a process of compromise that resulted in a legal arrangement that conceptualizes abortion in language devoid of rights-talk.

This Article critically analyzes the give-and-take process in the Israeli legislature that gave birth to the country's abortion law and uncovers the disguised costs of abortion compromises. From an American perspective, the Israeli case study provides a cautionary tale of a legal system in which abortion regulation was decided exclusively by legislators, rather than by judges, which resulted in legislation devoid of any concept of individual rights. This case study touches the heart of ongoing debates regarding the wisdom of *Roe v. Wade*'s judicially imposed, strict rights-based approach to legal abortion, which recognized a woman's constitutional right to terminate her pregnancy.⁷ As the issue of abortion remains extremely controversial in American politics and as legislative and political decisions are making abortions less and less available,⁸ *Roe v. Wade* and

7. In *Roe v. Wade*, the United States Supreme Court ruled that the right to privacy under the Due Process Clause of the Fourteenth Amendment extended to a woman's decision to have an abortion, but that this right must be balanced against the state's two legitimate interests in regulating abortions: protecting women's health and protecting the potentiality of human life. The Court concluded that these state interests become stronger over the course of a pregnancy and balanced them against the woman's interests by developing the trimester framework, which permitted greater state regulation of abortion in the second and third trimesters of pregnancy. 410 U.S. 113 (1973). Almost twenty years later, in *Planned Parenthood v. Casey*, the Court affirmed *Roe*'s basic ruling that a constitutional right to privacy protects the woman's decision to have an abortion. However, the Court rejected the trimester framework and replaced it with the "undue burden" standard for abortion restrictions. This revised standard allows the state to pass any abortion regulation that promotes its legitimate interests as long as it does not impose a substantive obstacle that prevents a woman from obtaining an abortion. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

8. For recent accounts of state legislative initiatives to limit women's access to abortion, see Tamar Lewin, *Ohio Bill Would Ban Abortion if Down Syndrome Is Reason*, N.Y. TIMES (Aug. 22, 2015),

its progeny have come under heavy critique. It has been argued that the Court's rights-based rhetoric, coupled with the "undemocratic" judicial imposition of a resolution to the issue of abortion, played a central role in triggering the ongoing conflict over abortion. The literature often relies on comparative examples to argue in favor of legislative and policy solutions to the issue of abortion not centered on rights-talk. Some scholars contend that if abortions were permitted in the United States as a result of a democratic legislative process of deliberation, conciliation, and compromise, rather than a judicial imposition of a strict concept of rights, it would ease the conflict over abortion and pave the path toward increased access to legal abortion for women.⁹

This Article casts doubt on these contentions. Based on analysis of the Israeli case study, it provides a critical account of abortion legislation that seems to align with the conciliatory and compromise-based solution advocated by critics of *Roe v. Wade*'s judicially created right to abortion. The Article argues that the political compromise that facilitated the enactment of Israel's abortion reform ultimately resulted in an abortion law that is at odds with the original intention of its framers, in that it is neither realistic nor enforceable. Lacking a rights framework that could guide the law's implementation, enforcement agents have been left to outline their own framework for regulation. This has resulted in the gradual creation of alternative mechanisms for abortion approvals that are implemented parallel to the law rather than within it. In practice, these alternative mechanisms actually delineate the scope of most abortions performed in Israel today. What appears to be a legal abortion in Israel is in fact an illegal one.

The Article proceeds in three parts. Part I questions the superiority of legislative solutions to abortion by tracing the legislative history and normative context that shaped existing abortion law in Israel. It reveals the give-and-take of the legislative process, which required feminist legislators to put rights-based rhetoric aside and to couch proposed abortion legislation in nationalist and religious frameworks that are at odds with any concept of individual rights. This feminist compromise was an inevitable product of a majoritarian process in a legislature immune from judicial review. It ultimately facilitated the repeal of the ground

<http://www.nytimes.com/2015/08/23/us/ohio-bill-would-ban-abortion-if-down-syndrome-is-reason.html>; Frances Robles, *State Legislatures Put Up Flurry of Roadblocks to Abortion*, N.Y. TIMES (May 8, 2015), <http://www.nytimes.com/2015/05/09/us/politics/state-legislatures-put-up-flurry-of-roadblocks-to-abortion.html>. The constitutionality of one such law, which imposed strict requirements on abortion clinics in Texas and was expected to leave Texas with approximately seven or eight clinics, serving 5.4 million women of reproductive age, was recently challenged in the Supreme Court. The Court struck down as undue burdens provisions of the law that required doctors who perform abortions to have difficult-to-obtain admitting privileges at a local hospital and required abortion clinics to have costly hospital-grade facilities. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). For an account of additional contemporary initiatives at the federal level to restrict access to abortion, see David M. Herszenhorn, *Abortion Bills Advance, Setting Up a Showdown*, N.Y. TIMES (Sept. 17, 2015), <http://www.nytimes.com/2015/09/18/us/abortion-bills-advance-setting-up-a-showdown.html>.

9. See *infra* Section III.A.

for abortion that the bill's framers had considered to be most important in expanding women's legal access to abortion: the socioeconomic ground. This development undermined the significance of the entire abortion reform and led to the formation of a law that is unrealistic and unenforceable.

Part II of the Article analyzes the enforcement mechanisms for abortion approval that developed following the enactment of abortion legislation devoid of any concept of rights. This Part illustrates how the problematic nature of the reformed abortion law prompted the gradual creation of alternative mechanisms for abortion approvals by the law's primary enforcement agents, the Pregnancy Termination Committees and the Minister of Health. These mechanisms of circumvention, which evolved in parallel to formal legislation, are the ones that actually delineate the scope of "legally performed" abortions in Israel today. The result is highly problematic in terms of gender equality in Israel and the rule of law.

Part III returns to *Roe v. Wade*'s democratic and rights-based critique. It explores the substance of the arguments favoring statutory and conciliatory solutions to abortion and questions their strategic desirability and normative coherence in light of relevant lessons from the Israeli case study. It also broadens the comparative analysis and discusses developments in abortion legislation in Canada, Germany, and France, highlighting the value of these comparative models in shedding additional light on the importance of a guiding framework of rights for developing proper abortion policies.

I. ABORTIONS IN ISRAEL: HISTORICAL BACKGROUND

A. From British Mandatory Law to Israeli Legislation

Until 1977, the abortion law in Israel was based on a set of provisions anchored in the British Mandatory Criminal Law Ordinance of 1936.¹⁰ These provisions, adopted together with most of the criminal code when the State of Israel gained independence in 1948, categorically proscribed both performance of abortions and assistance in the performance of abortions.¹¹ This ban on abortions

10. Criminal Code Ordinance No. 74 of 1936, § 175-177, 1936 Palestine Gazette Supp. 1 p. 334-335.

11. Section 175 of the Criminal Code Ordinance read: "Any person who, with intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony, and is liable to imprisonment for fourteen years." *Id.* In 1966 the maximum sentence for this offence was reduced to five years. See Law for Amendment of the Criminal Code Ordinance (No. 28), 5726-1966, SH No. 481 (1966) (Isr.). Section 177 of the Criminal Code Ordinance extended criminal liability to "[a]ny person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child. . . ." Criminal Code Ordinance No. 74, *supra* note 10. Alongside these provisions, Section 176 imposed criminal liability and the potential of imprisonment for up to seven years on a pregnant

was based on relevant sections in the English Offences Against the Person Act of 1861.¹²

In an attempt to allow some room for the performance of abortions within the framework of the existing legislation, the Supreme Court in 1952 recognized an exception to the categorical ban on abortion, ruling that the prohibition did not apply to abortions intended to save the woman's life or to protect her physical or mental health.¹³ Still, the reality was that most abortions were performed underground. The number of illegal abortions performed was estimated to be between 25,000 and 40,000 per year—more than twice the number of legal abortions.¹⁴ The prosecutorial policy during that period was to decrease, as much as possible, the number of criminal charges filed for these offenses and to refrain from criminal proceedings when procedures were performed in accordance with the woman's will and did not jeopardize her life or health.¹⁵

In 1972, the Minister of Health appointed a public committee, headed by Meir Gabai, to study the legal ban on abortions and to recommend amendments to the abortion statute. Two years later, the Gabai Committee submitted its report, which included a detailed outline for a comprehensive reform. The essence of this reform was that abortions would continue to be criminally sanctioned except in cases in which a three-person committee, consisting of two doctors and a social worker, approved pregnancy termination based on one of several possible grounds.¹⁶ The proposed grounds included, in addition to the woman's life and health, considerations relating to the woman's socioeconomic condition, the health of the fetus, the woman's age, and whether the pregnancy stemmed from rape or incest.¹⁷

woman performing or attempting to perform an abortion on herself, though this provision was abolished by the Israeli legislature in 1966. *Id.*

12. The Offences Against the Person Act of 1861, 24 & 25 Vict. c. 100, §§ 58-59 (Eng.). Under this Act, any person who, with intent to procure the miscarriage of a woman, unlawfully administered any noxious thing or used any means whatsoever was subject to imprisonment for up to fourteen years. A pregnant woman who undertook the same act or consented to its performance was subject to the same penalty.

13. *CrimC (Hi) 207/52 Attorney General v. Horovitz*, PM 5712(5) 459 (1952) (Isr.). This decision followed a similar decision by the English House of Lords: *R. v. Bourne* [1939] 1 K.B. 687 (Eng.).

14. Report of the Committee for the Study of the Ban on Induced Abortions, 17(4) Public Health 427, 475 (1974) [hereinafter Gabai Committee Report].

15. This policy was drafted by the then Attorney General Haim Cohen. See LOTTE SALZBERGER ET AL., PATTERNS OF CONTRACEPTIVE BEHAVIOR AMONG JERUSALEM WOMEN SEEKING PREGNANCY COUNSELING 1980-1989, at 12 (1991); YISHAI, *supra* note 4, at 209.

16. Gabai Committee Report, *supra* note 14.

17. Specifically, the Gabai Committee recommended that abortions could be approved by Pregnancy Terminations Committees under one of six possible conditions: (1) the continuation of the pregnancy constitutes a threat to the life of the woman; (2) the continuation of the pregnancy endangers the physical or mental health of the woman; (3) there is a potential risk the child would be born with a physical or mental abnormality; (4) the pregnancy resulted from incest or rape; (5) the woman is either under the legal age of marriage or over forty-five years old; or (6) grave harm could be caused to the woman or to her children as a result of the woman's social conditions, including the number of children already part of her household. *Id.* at 432.

Based on the Gabai Committee's recommendations, a number of Members of Knesset formulated a Bill of Amendment to the Penal Law that slightly expanded the proposed grounds for abortion and added an additional ground: pregnancy resulting from extramarital relations.¹⁸ After official endorsement by the government, this bill was approved in a preliminary vote and referred to the Knesset's Public Services Committee for further deliberation.¹⁹ It was challenged by a more liberal, alternative bill proposed by MK Marcia Freedman. MK Freedman was a formal representative of the feminist movement in the Knesset, and her bill, modeled after the central holding of *Roe v. Wade*, proposed that the law allow abortion on demand during the first twelve weeks of pregnancy.²⁰ During the Public Services Committee's deliberations, Freedman's alternative bill was discarded,²¹ and the Committee focused instead on the bill based on the Gabai Committee's recommendations. A first draft of this bill was brought to an initial vote in 1976, and the bill was approved into law by the Knesset a year later, as the Amendment to the Penal Code (Pregnancy Termination) of 1977.²² Following the procedural outline recommended by the Gabai Committee, the new arrangement maintained a general criminal prohibition on the performance of abortions, while providing a few additional criteria for exceptions, which, when applicable, would allow a three-person committee to approve an abortion. Specifically, the law provided that in order to obtain a legal abortion, a woman must fulfill one of five criteria: (1) the woman is under marriage age or over forty;²³ (2) the pregnancy is the result of criminal, non-marital, or incestuous relations; (3) the fetus is likely to have a physical or mental defect; (4) continuation of the pregnancy is likely to endanger the woman's life or cause her physical or mental harm; or (5) family or social conditions dictate the abortion.

Two years after the enactment of the original bill, the fifth ground for abortion—known as “the socioeconomic clause”—was repealed by the legislature and abortion approvals were ultimately restricted to only four permissible grounds.²⁴ These grounds were recognized as equally valid throughout the entire pregnancy, up to full gestation. In practice, however, this would not be the case for very long.

18. Draft Bill of Amendment to the Penal Law (Abortions), 5736-1975, HH No. 1217 p. 1334 (Isr.).

19. DK (1975) 1328 (Isr.).

20. Draft Bill of Amendment to the Penal Law (Abortions), 5734-1974, in DK (1975) 1334-1335 (Isr.).

21. MARCIA FREEDMAN, *EXILE IN THE PROMISED LAND* 96 (1991).

22. 5737-1977, SH No. 842 p. 70 (Isr.). The law was passed by the Knesset in January 1977. Section 12 of the law stated that it would go into effect one year after its enactment. The law's provisions were integrated into the Penal Law as sections 312-321 under a new chapter entitled “Pregnancy Termination.”

23. The legal age of marriage at the time was seventeen. Several years ago, the Israeli legislature amended the relevant legislation and the age of marriage was determined to be eighteen. See Marriage Age Law (Amendment No. 6), 5774-2013, SH No. 2416 p. 58 (Isr.).

24. See *infra* Section I.C.

B. Abortion Reform Without Rights

This legislative reform was in accordance with cross-national trends towards liberalizing restrictive abortion policies²⁵ and was inspired by a number of specific legal models that were formulated in other countries during the same period.²⁶ However, in Israel, several unique circumstances played a role in motivating abortion reform and ultimately contributed to the distinct characteristics of the final abortion law. Specifically, the call for reformation of the old abortion law resulted from the confluence of a number of often-conflicting political pressures. Many legislators and government officials were seeking new measures to respond to national concerns about declining population growth and the differential fertility rates between Arabs and Jews, which had their own unique relevance in light of the Arab-Israeli conflict.²⁷ Surrounded by heavily populated Arab states and involved in numerous armed conflicts with a coalition of these states since its establishment in 1948, Israel's political agenda was shaped by persistent demographic anxiety and a resultant desire to promote extensive population growth among the Jewish sector of the population.

It was viewed as equally imperative to discourage high birthrates among poor Jewish families. Research data collected in the 1960s and early 1970s by two governmental committees showed a correlation between chronic problems of poverty and ethnicity and family size.²⁸ This data also drew attention to the

25. See *supra* note 3 and accompanying text.

26. The recommendations of the Gabai Committee were influenced by the British Abortion Act of 1967. While preserving a criminal ban on abortion, the British act authorized abortion in cases where two registered medical practitioners certified, in good faith, that the continuation of the pregnancy would entail risk to the life or health of the woman, or to any existing children in her family. It also provided that "account may be taken of the pregnant woman's actual or reasonably foreseeable environment." The primary significance of this reform was the implicit reference to social considerations as a potential ground for abortion, in addition to the more traditional medical grounds. Abortion Act of 1967, c. 87 (Eng.) (emphasis added). In 1990, this Act was amended by the Human Fertilization and Embryology Act of 1990. Today, it clearly distinguishes between social grounds and medical grounds for abortion and restricts the former to pregnancies that have not exceeded twenty-four weeks. For an overview of current abortion law in the United Kingdom, see *Abortion Policies: A Global Review*, UNITED NATIONS, <http://www.un.org/esa/population/publications/abortion/profiles.htm> [hereinafter UN, *Abortion Policies*]. The alternate bill proposed by MK Marcia Freedman declaratively embraced the framework for abortion regulation dictated by *Roe v. Wade*. See FREEDMAN, *supra* note 21, at 90.

27. YISHAI, *supra* note 4, at 212.

28. In the 1960s, politicians began to realize that unmonitored incentives for population growth could lead to the intensification of another social problem: high birthrates among poor families. A Natality Committee, appointed by the Prime Minister to investigate the consequences of the government's indiscriminate pro-natality policy, highlighted the problem of large families among the poor, who were mostly of North African and Middle Eastern origin, and recommended, for the first time, the development of programs for family planning among these sectors of the population. At an average of 4.4 children per woman, the fertility rate for Jewish women of North African and Middle Eastern origin was almost double that of Jewish women of European origin, who had on average 2.5 children. The urgent need for family planning services was further stressed by another committee, appointed in 1972 to investigate problems of children and youth in distress. This second committee collected significant data on these issues and focused public attention on the growing social gap between large (and most often poor) families and families with fewer children. See SALZBERGER ET AL., *supra* note 15, at 7; YISHAI, *supra* note 4, at 213; Delila

manner in which social deprivation among certain sectors of the Jewish population could have grave effects on future generations and, consequently, on the development of the state.²⁹ The idea of adopting a more nuanced policy that encouraged family planning among the poor (who were mostly of North African and Middle Eastern origin) while simultaneously promoting pro-birth policies among the more affluent (who were mostly of European origin) was gradually gaining support. An increased governmental commitment to pregnancy termination law enforcement was perceived to be an important measure in promoting both of these national goals. The assumption was that more realistic and enforceable legal norms would enable law enforcement authorities to better control the availability of abortions based on both pro-fertility and family-planning state interests.³⁰

In addition, a political call for abortion reform came from advocates of women's rights in the Knesset and from the emerging Israeli feminist movement, organized in the early 1970s primarily by American immigrants who were inspired by the rise of second-wave feminism a decade earlier in the United States and by the American feminist efforts to liberalize abortion that eventually led to *Roe v. Wade*.³¹ These forces called for a legislative reform that would recognize a woman's right to abortion.³² In 1973, the feminist movement joined forces with the Party for Civil Rights and Peace and was guaranteed the third place on the party slate for one of its representatives. The war that broke out between Israel and a coalition of Arab states, led by Egypt, in October of that year resulted in thousands of casualties on the Israeli side and gave the Party for Civil Rights and

Amir & Niva Shoshi, *Feminism and Empowerment of Women in Israel: Abortion Policy as a Test Case*, in EMPOWERMENT ON TRIAL 777, 792-97 (Mimi Ajzenstadt & Guy Mundlak eds., 2007).

29. YISHAI, *supra* note 4, at 213-14.

30. Despite the unique characteristics of Israeli society at the time, it is important to note that the idea of an abortion policy that draws class and race distinctions between those who are "unfit" to reproduce and those who should be encouraged to reproduce for the sake of the nation can be found in the American context as well. The campaign for criminalizing all abortions that was launched by the American Medical Association in the mid-nineteenth century relied heavily on racial and class-based politics. It ended successfully in 1890 when most states passed laws criminalizing all abortion with the exception of cases of medical necessity. While these laws would ultimately affect all women, the anti-abortion campaign focused on middle class, white, Anglo-Saxon, married women. The argument was that these women were the ones obtaining abortions and consequently threatening to undermine the dominance and power of the Anglo-Saxon elite. See Nicola Beisel & Tamara Kay, *Abortion, Race, and Gender in Nineteenth-Century America*, 69 AM. SOC. REV. 498 (2004). Similarly, sterilization policies designed to prevent the "unfit" from reproducing were developed around the same time and were based on similar rationales purporting to improve the population. See generally NICOLE HAHN RAFTER, *CREATING BORN CRIMINALS* (1998). Even now, sterilization policies are largely directed against poor and minority women, who are much more likely to be sterilized or have a hysterectomy or tubal ligation in the United States than are middle-class white women. See Charlotte Rutherford, *Reproductive Freedoms and African American Women*, 4 YALE J.L. & FEMINISM 255 (1992).

31. A personal perspective on the rise and formation of the Israeli feminist movement in the early 1970s and its contribution to the campaign for abortion reform can be found in the memoirs of Marcia Freedman. See FREEDMAN, *supra* note 21.

32. YISHAI, *supra* note 4, at 214.

Peace an unexpected victory—three seats in the Knesset.³³ The new feminist movement elected MK Marcia Freedman to be its official representative in the legislature. Thus, the call for abortion reform was diverse and represented a number of conflicting political agendas. A few proponents conceptualized the proposed reform as a clear issue of individual rights,³⁴ while the vast majority endorsed this move based on national demographic concerns that were completely detached from rights discourse. Both angles were instrumental in mobilizing the process of legislative reform. While each of the distinctive rationales for abortion reform was initially put on the legislative agenda, the rights agenda was eventually set aside. All supporters of the proposed reform united behind the demographic agenda, as evidenced by a comparison between the prevailing legislative rhetoric supporting the proposed reform in its initial stages and the manner in which it was discussed in later stages.

The original proposed amendment to the penal law on abortion was submitted as a private bill endorsed by the government and sponsored by several Members of Knesset, MK Chaika Grossman and four other female MKs among them. This bill was based on the recommendations of the Gabai Committee regarding the establishment of Pregnancy Termination Committees and a list of criteria under which these committees might approve abortions in individual cases. In the preliminary stages of deliberation, one of the sponsors of this Bill, MK Haviv Shimoni of the ruling Labor Party, spoke explicitly about the considerations of gender equality that stood behind the proposed reform. When presenting the initial draft of the proposed legislation to the Knesset for a preliminary vote in 1975, before it was referred to the Public Services Committee, MK Shimoni described the efforts of female Labor Party members to include a special clause in the Labor Party's platform.³⁵ This clause declared that the Party would:

33. The 1973 October War was a breaking point for the Israeli public. When the war ended, public criticism intensified. Many people thought that the government, headed by the Labor Party, had failed. Although the Labor Party remained the ruling party after the parliamentary elections held in December, it lost five seats in the Knesset. The Party for Civil Rights and Peace, which was established that year by Shulamit Aloni, a former member of the Labor Party, and advocated electoral reform, peace, and human rights, got some of the votes that the Labor Party lost. See generally Naomi Chazan, *Shulamit Aloni*, JEWISH WOMEN'S ARCHIVE, <https://jwa.org/encyclopedia/article/aloni-shulamit>; 1973 Elections, NAT'L LIBR. ISR., http://web.nli.org.il/sites/NLI/English/collections/treasures/elections/all_elections/Pages/e1973.aspx.

34. For instance, in her legislative proposal for abortion reform that was initially endorsed by six other Members of Knesset, Marcia Freedman added an explanatory note that read: "Another relevant universal development is the growing recognition that a preferable status should be granted to human rights and among them individual liberty and freedom of belief and conscience. The right to choose freely [] to bring a child to the world involves a decision regarding the willingness to bear the burdens of pregnancy, the desire to marry and to have a family, to extend it, to raise children and to drastically change ways of life and future plans. This right is therefore a predominant aspect of individual liberty that cannot be unjustly restricted." Draft Bill of Amendment to the Penal Law (Abortions), in DK (1975) 1334-1335, 5734-1974 (Isr.).

35. DK (1975) 1317 (Isr.).

endeavor to accelerate the work of the expert committee appointed by the Minister of Health for the purpose of studying the subject of abortions. The committee's findings and recommendations will be discussed in an effort to honor a woman's right to choose, within the necessary limitations for ensuring her health, as recommended by certified medical consultation services.³⁶

He concluded by exploring the significance of the fact that 1975 had been declared International Women's Year:

I do not think that I exaggerate when I say that women in Israel, as a result of their very activity, with natural regard for their place in society, have garnered unprecedented achievements. . . . The fact that the individual presenting the bill is not a woman attests to the level of identification with and recognition of women's rights and their place in society.³⁷

This detailed reference to gender equality by one of the sponsors of the bill, which drew an explicit link between the proposed abortion reform and the status of women in society, did not repeat itself in subsequent parliamentary deliberations. It was the first and the last time during the lengthy legislative debate that legislators would focus on gender equality as a central rationale for the bill. Moreover, the alternative bill sponsored by MK Marcia Freedman, which was based on a clear conception of women's rights and modeled after the central holding of *Roe v. Wade*, was soon set aside by the Public Services Committee.³⁸ The Committee, chaired by MK Chaika Grossman, decided to focus exclusively on the more restrictive version of the bill originally proposed by the Gabai Committee, which excluded any mention of rights.

In her memoir, written years later, Marcia Freedman argued that Chaika Grossman was responsible for the failure of Freedman's proposed bill in the Public Services Committee.³⁹ She argued that, out of self-centered political considerations, Grossman convinced most members of the committee, who initially supported Freedman's proposal, to endorse the more restrictive alternative. According to this narrative, Grossman and the other female Members of Knesset from the Labor Party complied with pressure from the Party's leadership to support the bill that was seen as representing the Party's official position on abortion. Essentially, Freedman argued that Grossman and the other female Labor MKs sacrificed the interests of women on the altar of self-centered considerations.⁴⁰

36. *Id.*

37. *Id.* at 1319.

38. See *supra* notes 20-21 and accompanying text.

39. FREEDMAN, *supra* note 21, at 96.

40. *Id.* at 90-91.

However, the parliamentary record tells a more nuanced story than Freedman's recollection of the events.

It is clear that the majority of legislators who were inclined to support the proposed reform did not necessarily draw a link between abortion legislation and women's rights. Their impetus for reform stemmed from demographic concerns, and they were primarily aiming to secure government control in an area where legal norms had ceased to matter. There was a nearly complete absence of any conception of rights as an organizing framework for the legal regulation of pregnancy terminations. Contrary to legal models formulated in other countries during that time, which acknowledged the pregnant woman (and sometimes the fetus) as possessing individual constitutional rights,⁴¹ in Israel, the woman (as well as the fetus) was treated as an object. The debate, even among most proponents of the bill, revolved around the manner in which wider access to abortion would serve national interests, particularly the ability to control fertility rates among underprivileged strata, while not adversely affecting the demographic interests of the State of Israel in promoting population growth.

For instance, Minister of Health Victor Shem-Tov, who appointed the Gabai Committee, explained during the first parliamentary deliberation regarding the proposed reform:

There is a public misconception whereby family planning would necessarily lead to a decrease in birthrate. . . . Family planning would cause regulation of the birthrate without decreasing the natural propagation in which we are necessarily interested, but rather the opposite: it may lead families currently having one or two children to increase the number of children, while families having a multitude of children . . . without having the ability to support and educate them, might perhaps reach a more desirable plan for the family.⁴²

These prevailing attitudes toward abortion reform should be understood in light of two significant characteristics of Israeli law and society in the early 1970s. First, an important aspect of Israeli society that played a role in shaping social and legal attitudes toward pregnancy termination was the nationalist and patriarchal expectation that women would contribute to the nation's growth by fulfilling their maternal role.⁴³ This expectation was inspired by the national

41. Two notable examples from the 1970s are the U.S. Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), and the 1975 Western German Constitutional Court decision, 39 BVERFGE 1 (1975) (Ger.). For an analysis of the significance of the rights framework that underlies the German decision and its relation to the American decision, see *infra* notes 195-196 and accompanying text.

42. DK (1975) 1322 (Isr.).

43. NOYA RIMALT, *LEGAL FEMINISM FROM THEORY TO PRACTICE: THE STRUGGLE FOR GENDER EQUALITY IN ISRAEL AND THE U.S.* 129-38 (2010); Nitza Berkovitch, *Motherhood as a National Mission: The Construction of Womanhood in the Legal Discourse in Israel*, 20 WOMEN'S STUD. INT'L F. 605, 607 (1997); Noya Rimalt, *Equality with a Vengeance: Female Conscientious Objectors in Pursuit of a Voice and Substantive Gender Equality*, 16 COLUM. J. GENDER & L. 99, 104-08 (2007); Noya Rimalt, *Good*

ethos that accompanied the founding of the State in 1948, according to which Israel, established as a response to the Holocaust, was predestined to bring about the rejuvenation of the Jewish people in their homeland. Increasing the size of the Jewish population by encouraging women to have more children was also deemed vital to the country's political future in light of the Arab-Israeli conflict.⁴⁴ Numerous laws that were enacted in the country's formative years were designed to achieve this goal by encouraging the influx of Jews to the newly established country and by promoting a higher birthrate among Jewish women.⁴⁵ Encouraging large families among the Jewish population and reinforcing a pro-natality climate through policies and incentives in a broad range of public spheres were especially important as birth rates among Jewish women declined in the decades following the establishment of the State⁴⁶ and the impact of immigration on population growth appeared to be unsatisfactory.⁴⁷

A second characteristic of the Israeli legal system that sheds light on the manner in which most Israeli legislators approached the issue of abortion was the lack of a constitution or a bill of rights. Israel did not adopt a written constitution or a bill of rights upon its establishment. It was only in 1992 that the Knesset finally enacted two Basic Laws, which enshrined several human rights and are now perceived as Israel's semi-Bill of Rights.⁴⁸ Legislation that was drafted

Mother, Bad Mother, Irrelevant Mother: Parenthood in Law Between the Ideal of Equality and the Reality of Motherhood, 39 MISHPATIM 573, 581-84 (2010).

44. David Ben-Gurion, the country's first Prime Minister and one of its founding fathers, articulated the notion of women's reproductive responsibility in his memoirs: "Every Jewish mother can and must understand that the unique situation of the Jewish People . . . imposes on her a sacred duty to do her utmost for the nation's rapid growth. One of the conditions for growth is that every family has at least four sons and daughters, and the more the better." See DAVID BEN-GURION, ISRAEL: A PERSONAL HISTORY 839 (1971). One of the government's methods of supporting pro-birth policies in the 1950s was a system of cash prizes for women bearing their tenth child. The program was discontinued in 1959 when it was realized that the majority of women awarded the prize were Arabs. LESLEY HAZELTON, ISRAELI WOMEN: THE REALITY BEHIND THE MYTHS 71 (1977); SALZBERGER ET AL., *supra* note 15, at 6. In 1967 the Demographic Center was established as part of the Prime Minister's office. Its official goal was "to act systematically in carrying out natality policy intended to foster a psychologically favorable climate, such that natality will be encouraged and stimulated, an increase in natality being crucial for the whole Jewish people." *Id.* at 7.

45. One of the first laws that provided a legal basis for pro-immigration policy was the Law of Return, passed by the Knesset in the early 1950s. This law encouraged Jews from around the world to settle in Israel with the assistance of the State. See Law of Return, 5710-1954, SH No. 51 p. 159 (Isr.). Another significant law was the Labor of Women Law. Enacted in 1954, this law provided numerous maternity rights to working women, such as paid maternity leave or reduced working hours for mothers of young children, in an effort to ease the double burden of motherhood and paid labor. See Labor of Women Law, 5714-1954, SH No. 160 p. 154 (Isr.). For a discussion of the social attitudes toward women's maternal role that shaped this bill, see RIMALT, *supra* note 43, at 135-38; Rimalt, *Good Mother*, *supra* note 43.

46. In 1951, the average number of children among Jewish women was four. This number decreased to 3.3 in 1962 and to 3.2 in 1972. See ZIONA PELED & NANCY BACKMAN, INDUCED ABORTIONS IN ISRAEL: BEHAVIORAL RESEARCH ON APPLICATIONS TO THE PREGNANCY TERMINATION COMMITTEES 5 (1978); YISHAI, *supra* note 4, at 212.

47. YISHAI, *supra* note 4, at 212.

48. Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 (Isr.); Basic Law: Freedom of Occupation, 5754-1994, SH No. 1454 (Isr.). In a landmark 1995 Israeli Supreme Court decision, the Court determined that these Basic Laws constitute Israel's semi-constitutional bill of rights and form the

in the 1970s was therefore formally immune from judicial review. In the absence of a guiding framework of constitutional rights, legislators were not accustomed to taking into account the normative restraints of individual rights when formulating new legislation.

These two characteristics of Israeli law and society contributed to the relative marginality of the feminist movement in those years and rendered arguments in favor of gender equality negligible and ineffective in shaping public discourse.⁴⁹ In the early 1970s, women were almost completely absent from the decision-making levels in the economic, political, and social spheres.⁵⁰ Moreover, due to the prominent role played by American immigrants in the establishment of the Israeli feminist movement, feminism was identified as a foreign import and perceived as alien to Israel's collective values. It was even seen as a threat in that it undermined women's readiness to accept the dominant national agenda. Two wars in that period between Israel and a coalition of Arab states—the Six-Day War of 1967 and the 1973 October War—further entrenched the national security agenda and rendered ideas of individual freedoms and gender equality secondary to public concerns related to the Arab-Israeli conflict.

It appears that within this context, MK Chaika Grossman estimated that rights-talk would hinder the potential for abortion reform. She assumed that legislation based on the Gabai Committee's recommendations would better resonate with the concerns of the majority of legislators, so she articulated her arguments in support of the bill accordingly. Moreover, the parliamentary record suggests that she and other sponsors of the bill believed that adding a socioeconomic ground for abortion as part of the proposed reform would practically address the needs and interests of most women seeking abortions. The relevant data at the time indicated that the majority of abortions were performed because of familial, economic, or social reasons and were not medically or criminally related.⁵¹ Thus, the socioeconomic clause was considered by the bill's sponsors to be a significant expansion of women's legal access to abortion and therefore a reasonable substitute for MK Freedman's rights-talk and her proposal for abortion on demand in the first trimester, which did not enjoy wide support in the Knesset. Under these circumstances, the primary challenge for Grossman and other sponsors of the bill was to rhetorically frame the rationale for abortion reform, and

basis for the exercise of judicial review. See *Mizrahi Bank Ltd. v. Migdal Cooperative Vill.*, 49(4) PD 221 (1995) (Isr.).

49. Noga Morag-Levine, *Abortion in Israel: Community, Rights, and the Context of Compromise*, 19 L. & SOC. INQUIRY 313, 321 (1994).

50. RIMALT, *supra* note 43, at 141; Yael Azmon, *Women and Politics: The Case of Israel*, 10 WOMEN & POL. 43, 46 (1990).

51. The Gabai Committee Report that served as a basis for the proposed abortion reform referred specifically to this point, citing data from a 1969 study that revealed that, among underprivileged groups, 82.1% of requests for pregnancy termination were based on socioeconomic reasons. Gabai Committee Report, *supra* note 14, at 469. These data were corroborated by another study of socially deprived families, in which respondents identified the problem of unintended pregnancy as a major predicament, third only to financial and housing difficulties. See SALZBERGER ET AL., *supra* note 15, at 7.

particularly for the socioeconomic ground for abortion, in a way that addressed the concerns of most legislators.

After the Public Services Committee, chaired by Grossman, agreed on a final draft of the bill, it was brought to the Knesset for further deliberation and approval. Grossman, who introduced this draft to all the Members of Knesset, sought to rally broader support for the draft before the first, second, and third votes.⁵² As the quote at the beginning of this Article indicates, she refrained from referring to women's rights and clung to rhetoric that addressed the sentiments of most legislators, stressing once again:

Opposition to the Law based on the demographic problem is irrelevant. . . . It is likely that following the Law's enactment, the overall number of abortions would decrease, as the medical committees would have no interest in approving numerous abortions unless doing so is justified according to the criteria provided by the Law. . . . The proposed bill does not seek to decrease the birthrate, but vice versa.⁵³

Indeed, legislative records from this period reveal that nationally oriented appeals provided the most significant unifying framework for garnering support for the bill. These records illustrate that support for the bill relied, in most cases, on an unwavering normative position regarding the legitimacy of the regimentation of women's bodies on behalf of national interests. Support for the bill almost completely disregarded the position that viewed the woman (or the fetus) as being in possession of legitimate rights.

The near-complete absence of rights-talk among the proponents of the bill and their adherence to the national-demographic discourse as a legitimate basis for regulation of abortion created an unexpected bond between the bill's supporters and the bill's opponents, most of them representatives of the religious and ultra-Orthodox parties in the Knesset. As opposed to the Catholic faith, Jewish attitudes towards abortion are more nuanced and revolve around a distinction between necessary and unnecessary abortion that rests on the supremacy of maternal life in Jewish law.⁵⁴ In the eyes of ancient Jewish law, the fetus has no

52. Knesset bills "are advanced in a number of stages, called readings. Every reading of a bill is adopted or rejected by a vote of the Knesset members present in the Plenum at the time. Between each reading, there are debates within the Knesset committees, and they prepare the bill for the next stage of legislation. After passing the third reading, the bill is published in the Official Gazette and becomes a law of the State of Israel." *Legislation*, KNESSET, https://www.knesset.gov.il/description/eng/eng_work_mel2.htm.

53. DK (1977) 1229 (Isr.).

54. See Yael Hashiloni Dolev, *A Life (Un)worthy of Living: Reproductive Genetics in Israel and Germany* 94, 99 (2007); David M. Feldman, *Birth Control in Jewish Law: Marital Relations, Contraception, and Abortion as Set Forth in the Classic Texts of Jewish Law* 275 (1995).

legal status since it is deemed part of its mother rather than an independent entity.⁵⁵ Hence, religious opposition to the law in the Knesset did not mirror a typical Western pro-life stance. While Orthodox Jewish MKs expressed their complete objection to the bill as a whole,⁵⁶ it turned out that, in actuality, most of their criticism was focused on the socioeconomic clause that allowed for abortion approvals to be based on a woman's social environment and economic circumstances. Their criticism relied on pro-natality arguments that were not substantially different from those made by the bill's proponents, at least with regard to the nature of the interests that should dictate the legal framework for abortions. MK Menachem Porush of the Religious Torah Front explained:

It is hard to accept the mere thought of proposing such law, a law that contravenes the foundations of Torah, . . . a law that contravenes the foundations and basic interests of our existence in this land as we face off in bitter competition with the Arabs within our borders and their natural propagation. We, who yearn for each new Jewish immigrant, shall enact a law that slays children in their mothers' womb only because there are already multiple children? How much toil, blood and sweat must we invest to achieve the immigration of 10,000 new Jewish immigrants?⁵⁷

In addition, central to the religious position were Halakhic beliefs and interests concerning the purity and wholesomeness of the family. Using such beliefs, it was easy to rally the support of Jewish Orthodox MKs to permit abortions in cases where the pregnancy did not stem from circumstances of a traditional family—such as single women's pregnancies, or pregnancies of married women in situations of adultery. This ground for abortion, which applied to all situations in which the pregnancy was “out of wedlock,” was not included in the original outline of the bill recommended by the Gabai Committee; rather, it was added to the bill by its sponsors in the Knesset.⁵⁸ As attested by parliamentary debate, the “out of wedlock” abortion provision enjoyed wide consensus from the outset. It was intended to allow abortion with no restrictions whatsoever for single women and married women who conceived out of wedlock, and were therefore expected to bear a child who, from a Jewish religious perspective, would be considered a “bastard.”⁵⁹ As “bastards” and their descendants are to be excluded from the

55. DOLEV, *supra* note 54.

56. For instance, MK Porush of the Religious Torah Front declared: “It is obvious that we absolutely object to this law as whole” DK (1975) 1324 (Isr.), and MK Shlomo Yaakov Gross of the same party characterized abortion as “the murder of a fetus in his mother's womb with no reason,” DK (1977) 1237 (Isr.).

57. DK (1975) 1324-1325 (Isr.).

58. See *supra* note 18 and accompanying text.

59. Under Jewish law, a child born to a married woman as a result of an extramarital affair is considered a bastard (*mamzer*). This status excludes this child and his or her descendants from the Jewish community for ten generations by forbidding them from marrying an ordinary (non-*mamzer*) Jewish

Jewish community under traditional Orthodox Jewish law, the birth of such children is perceived as a threat to the continuity of the Jewish collective. Hence, it was in the name of religious precepts—which held that single mothers or children born out of wedlock ought to be excluded from the definition of “proper” families and “proper” children—that the formal array of grounds for abortion was expanded from the originally proposed outline. This outcome was at odds with the combative religious rhetoric against the bill writ large.⁶⁰ At the same time, these religious precepts provided proponents of the bill with an opportunity to legalize abortion based on a broader array of grounds. Eventually, most of the opposition of the religious and ultra-Orthodox MKs was directed, as stated previously, toward the socioeconomic ground.

Their arguments against the bill in general and against the socioeconomic clause in particular were not in any way rights-based, but rather were motivated by concerns about the future of the Jewish people, the value of large families, and the perceived role of women as the guardians of the family.⁶¹ In that respect, preserving the traditional function of women as child-bearers through the enforcement of the biblical command to “be fruitful and multiply”⁶² was the primary concern of the Jewish Orthodox MKs. They were not concerned with the protection of the right to life of the fetus. While the legislative proposal to provide access to abortion to adulterous married women was never contested and was even implicitly endorsed by the ultra-Orthodox parties,⁶³ granting access to

spouse during that period of time. Philippa Strum, *Women and the Politics of Religion in Israel*, 11 HUM. RTS. Q. 483, 494 (1989).

60. For two illustrative comments from MKs, see *supra* note 56.

61. MK Pinhas Shifman of the National Religious Front argued: Don't we know that in every newborn there is an addition to [national] security? Don't we understand that giving such considerably easy opportunity to abortion will cause greater [sexual] permissiveness that has anyhow reached an enormous degree? As long as there is restriction on the performance of abortion, there is a stop in permissiveness and in conducting free life that involve[s] a disgrace and [carries] harsh consequences [for] a stable family life.

DK (1976) 1398 (Isr.). MK Yaakov Gross of the Religious Torah Front added:

What can we say to the world? On the one side we invest billions . . . to absorb Jews and to bring them to the Land of Israel, but on the other side we invest money to murder Jews. What is the logic in that? I no longer talk about the demographic problem. I cited here once the words of one Arab from the village of Sachnin that said: [while] you bear one child my wife bears five children. This is also true; this is also an argument—the demographic problem—and we have to take it into consideration. Therefore I say: whoever has a Jewish glimmer in his heart, should not raise his hand to support this law in its current form.

DK (1977) 1239 (Isr.).

62. *Genesis* 1:28.

63. The parliamentary record reveals that, in general, the “out of wedlock” ground for abortion attracted very little attention and was hardly contested. The “adultery” aspect of this ground was not once mentioned specifically throughout the lengthy deliberations, and it appears that everyone, including the religious Members of Knesset, fully endorsed this proposed ground. The only MK who declared his objection to the “out of wedlock” ground for abortion in its entirety and proposed to eliminate it from the legislative proposal was the secular conservative MK Menachem Yadid from the right-wing Likud party. Yadid based his objection on “national concerns” regarding the size of the Jewish population. However, it appears that, in actuality, his criticism was focused on single women and not on adulterous women. DK (1977) 1232-1233 (Isr.). His reservation was ultimately rejected by a large majority vote. *Id.* at 1258. Members of the national religious and ultra-Orthodox parties focused their efforts on outlining access to abortion that would be compatible with religious norms. The very few religious MKs who expressed some

abortion to married women based on socioeconomic considerations was perceived as a symbolic and substantive threat to the Jewish family and to traditional religious norms. After all, the average fertility rate for ultra-Orthodox Jewish women is almost triple the average birthrate in Israel.⁶⁴ Family planning and the use of contraceptives are incompatible with the community's prevailing ideology regarding the role of women in society.⁶⁵ This often leads to severe economic hardship among members of the ultra-Orthodox community. Indeed, this community is one of the poorest in Israel.⁶⁶ Yet the hegemonic religious discourse presents large families as a mandatory religious norm to be followed, regardless of economic hardship.⁶⁷ Restricting married women's access to abortion in situations of social and financial hardship therefore serves a crucial interest of the ultra-Orthodox leadership in maintaining high birthrates among women of their community and in maintaining control over women's bodies. More broadly, it delivers a symbolic message regarding the proper role of women in society and the sanctity of large families.

In sum, the dispute between the bill's proponents and opponents with regard to the socioeconomic ground took place in the same ideological realm in which the appropriate legal scope of abortion regulation was defined based on an array of considerations relating to the Jewish collective. This shared understanding of the proper ideological realm for parliamentary deliberation had two key results in terms of delineating the boundaries of the law eventually approved by the Knesset. First, it fostered the creation of curious alliances between opponents

objection to the "out of wedlock" ground for abortion focused explicitly on single women and suggested adding an age limit. MK Pinhas Sheinman from the Religious National Front and MK Yaakov Gross from the ultra-Orthodox Religious Torah Front suggested that, instead of providing unrestricted abortion access to all unmarried women, legal abortion should be restricted to unmarried women under the age of sixteen. MK Gross explained that this situation "is prohibited by the Halacha and according to the [Jewish] law [a woman under sixteen] should perform abortion." DK (1977) 1239 (Isr.). This proposal did not spark any discussion or debate and was eventually rejected along with the proposal by MK Yadid. *Id.* at 1258.

64. The average fertility rate among the general Jewish population in Israel is 2.6 children per woman, as opposed to 7.7 children per women in strictly ultra-Orthodox Jewish communities. This figure is related to the very low average marriage age among the ultra-Orthodox of 19.9, compared to 24.8 among the general Jewish population. See Norma Gurovich & Eilat Cohen-Kastro, *Ultra-Orthodox Jews Geographic Distribution and Demographic, Social and Economic Characteristics of the Ultra-Orthodox Jewish Population in Israel 1996-2001*, at 30 (Cent. Stat. Bureau, Working Paper Series No. 5, 2004) (Isr.).

65. *Id.* at 27; see also SUSAN MARTHA KAHN, *REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL* 3 (2000); JACQUELINE PORTUGUESE, *FERTILITY POLICY IN ISRAEL: THE POLITICS OF RELIGION, GENDER AND NATION* 45-47 (1998).

66. The average income per capita among ultra-Orthodox families is one-fourth that of the general Jewish population. Gurovich & Cohen-Kastro, *supra* note 64, at 51.

67. MK Yaakov Gross from the Religious Torah Front argued passionately when calling on Members of the Knesset to object to the socioeconomic clause, or at least to the clause's reference to the woman's number of children: "Gentlemen, we know from reality that there are families in Jerusalem, Bnei-Brak and all over the country that have eight children in one room, two rooms and neither think that because of this a pregnancy should be terminated. . . . This is a sign that it is possible to live in two rooms with eight children and it is possible also to educate them." DK (1977) 1239 (Isr.). Delila Amir and Niva Shoshi note that the ultra-Orthodox perceived the socioeconomic clause as a direct attack on their traditional ways of life and therefore focused most of their efforts on abolishing it. See Dalila Amir & Niva Shoshi, *Israeli Abortion Law: Feminist and Gender Implications*, in *STUDIES OF LAW, GENDER AND FEMINISM* (Daphne Barak Erez et al. eds., 2007).

and proponents of the law. For example, MK Menachem Yadid of the right-wing Likud Party, who opposed the bill during the first vote, declared that he would vote against it "out of responsibility for the fate of the nation and faith in the future of the Land of Israel."⁶⁸ He explained his opposition: "for a healthy society, we would do best to care for underprivileged and destitute families by improving their housing conditions, and above all dedicating our attention to education and guidance."⁶⁹ During the second vote, MK Yadid retracted his comprehensive opposition to the bill, clarifying that, since there was no chance at that stage to have the bill stricken from the agenda, he sought only to rally support for his particular reservations. MK Yadid found an unexpected ally in his opposition to the socioeconomic clause in MK Ari Ankorian of the Labor Party, the ruling party sponsoring the abortion reform. MK Ankorian did not oppose the bill in its entirety, but supported the proposition to delete the phrase "including a large number of children residing with her" from the socioeconomic clause. In its original version, this provision provided that a woman could receive approval from the Pregnancy Termination Committees if "continuation of the pregnancy might cause severe harm to the woman or her children, due to the harsh familial or social conditions of such woman or her environs, *including a large number of children residing with her*."⁷⁰ "If you ask me why," MK Ankorian explained,

I would say that even in our generation, we who are living here, present in this Knesset, have made huge sacrifices during the years of the Holocaust that befell our People, including vast numbers of children. This is a country of immigration, where we have such need for a multiplicity of children, such a great need for a multiplicity of Jews in this land.⁷¹

This position enjoyed vast support among both the bill's opponents—whether secular, religious or ultra-Orthodox—and amongst its proponents, most of whom did not challenge the principle that the demographic interest of the State of Israel in encouraging a higher birthrate among Jewish women should influence the scope of abortion legislation. The result was that the only amendment to the bill approved during the second and third votes was the amendment jointly initiated by MKs Yadid and Ankorian. The socioeconomic provision was thus approved in its abridged version, which omitted from the law any reference to a woman's number of children as a possible ground on which the Pregnancy Termination Committee might approve abortion.

A second important feature of the final abortion law, which also derived from the ideological consensus during the debate, was the absolute absence of

68. DK (1976) 1596 (Isr.).

69. *Id.* at 1595.

70. Draft Bill of Amendment to the Penal Law (Abortions), 5736-1975, HH No. 1217 p. 1334 (Isr.).

71. DK (1977) 1253 (Isr.).

any reference to gestation period as a factor in determining the permissibility of abortion. According to the language that was eventually approved by the Knesset, the grounds for abortion listed in Section 316 of the Penal Law were recognized as equally valid throughout the entire pregnancy, up to full gestation. This aspect of the law created a significant difference between the abortion law formulated in Israel and arrangements in other Western countries, where the liberalization of abortion laws was based on a perception of rights. In these other countries, clear boundaries for pregnancy termination were delineated according to the potential viability of the fetus.⁷² In Israel, on the other hand, where factors like the fetus's status and rights-talk in general were excluded from the process of formulating the law, abortions were permitted based on the exact same grounds, whether sought in the first week of pregnancy or the last. This fact was only marginally noted in Knesset deliberations, and even then, the issue did not spark any significant debate or opposition.⁷³ This fact is particularly intriguing since, at an earlier stage, the Knesset had considered a bill sponsored by MK Marcia Freedman, which presented an alternative abortion reform based on the American constitutional outline formulated at the time.⁷⁴ Adhering to *Roe v. Wade*'s central holding, Freedman proposed that the law grant women an unrestricted right to abortion during the first trimester and restrict this right at later

72. An important example is Sweden, which was one of the first Western countries to acknowledge social circumstances as legal grounds for pregnancy termination in the 1930s. The transition to a rights framework that acknowledges a woman's right to terminate a pregnancy occurred in 1960s and 1970s, with the appointment of a public commission tasked with examining existing legislation and recommending amendments thereto. The commission's recommendations, which served as the basis for a new abortion law enacted by the Swedish parliament in 1974, determined that a woman's will should be a central consideration in pregnancy termination. The law granted all women a right to terminate pregnancy on demand until the eighteenth week of pregnancy. The authority to approve later-term abortions was vested in a national committee for health and welfare. The law provided that such approval should not routinely be granted in cases in which the fetus was viable; only special reasons would justify terminating the pregnancy at that stage. The law further provided that when continuation of the pregnancy jeopardized the life or health of the woman, abortion could be approved at any stage of the pregnancy. See UN, *Abortion Policies*, *supra* note 26. For a discussion of the significance of legal developments in Sweden with regard to abortion and their relationship to the emergence of similar rights-based discourse on abortion in other Western countries, see Noya Rimalt, *From Unjust and Partial Access to Just Legislation: Toward a New Paradigm of Abortion Law in Israel*, 39 TEL AVIV U.L. REV. 415 (2016).

73. Only two Members of Knesset, Benjamin Halevy and Zerah Verheftig, raised this issue when the Knesset debated the proposed reform before its first reading. They suggested that when the Social Services Committee prepared the bill for the second and third readings, it should add a reference to the first twelve weeks of pregnancy as the period in which abortion could be approved by the Committees. Both MKs contended that when Chaika Grossman first introduced the proposed reform, she claimed that the suggested grounds for abortion would be applicable only to abortions performed in the first three months of pregnancy. DK (1976) 1597, 1608 (Isr.). When a final draft of the bill was brought for second and third readings, it was the lone voice of MK Pinhas Sheinman that highlighted the continued absence of the twelve-week limitation on abortion approval. DK (1977) 1235 (Isr.). In response, MK Chaika Grossman explained that "doctors" and "experts" who appeared before the Committee argued that there was no need for a time limit on abortion approvals, as all requests for abortion would be screened by a socio-medical committee. *Id.* at 1257. This response ended the debate, and there was no other reference to the issue in other parliamentary deliberations. *Id.*

74. Draft Bill of Amendment to the Penal Law (Abortions), 5734-1974, in DK (1975) 1334-1335 (Isr.).

gestation periods.⁷⁵ Thus, a legal outline for abortion that took into consideration the stage of gestation was put on the agenda, but it appears that, in the absence of a clear conception of rights as an organizing element of the proposed legislation, this aspect was not given any weight in the dominant discourse surrounding the bill.

C. The Repeal of the Socioeconomic Clause

These ideological aspects of the debate surrounding the new abortion law came up again later. The ultra-Orthodox parties adhered to their specific opposition to the socioeconomic clause and continued to oppose it even after its final approval by the Knesset in 1977. Under the coalition agreement signed by the right-wing Likud Party and these parties following the 1977 parliamentary elections, the ruling Likud Party undertook to abolish the socioeconomic clause that permitted pregnancy termination due to the harsh familial or social conditions of the woman or her environs. The provision was defined by the parties to the coalition agreement as deviating from the "*status quo* on religious matters."⁷⁶ A bill that sought to invalidate the socioeconomic clause under that rationale was brought before the Knesset and passed into law in 1979.⁷⁷ Thus, the provision that the bill's initiators considered to be the most significant means of expanding women's legal access to abortion was repealed shortly after the law was enacted.

The repeal of the socioeconomic clause created a situation in which the law was ultimately rendered quite distant from the reality to which it was meant to respond. As mentioned, relevant data in the 1970s indicated that the *majority* of abortions were sought by women who wished to terminate an unintended pregnancy due to social, familial, economic, and personal reasons.⁷⁸ In fact, these patterns of pregnancy termination are evident to this day, in Israel and worldwide: numerous studies attest to the preponderance of such socioeconomic factors—as opposed to criminal and medical factors—in women's decisions to end pregnancies.⁷⁹ The socioeconomic clause was thus the most important ground

75. *Id.*

76. DK (1978) 1470 (Isr.) (statement of MK Kalman Khana). For an explanation of the details and context of this compromise, see *id.* at 1471 (statement of Minister of Health Eliezer Shostak).

77. Penal Law, Amendment No. 8, 5740-1979, SH No. 954 p. 40 (Isr.).

78. See *supra* note 51 and accompanying text.

79. A series of studies conducted in the United States since the mid-1980s reveal that women's reasons for terminating pregnancies have remained consistent over time. The three dominant, recurring motivations are: economic hardship, lack of readiness for parenting, and partner difficulties. Specifically, a recent study that involved 1,209 abortion patients found that the two most common reasons cited by women were "having a baby would dramatically change my life" and "I can't afford a baby now" (cited by 74% and 73%, respectively). A large proportion of women cited relationship problems or a desire to avoid single motherhood (48%). Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110-18 (2005). These motivations were identified in earlier studies as playing a primary role in American women's decisions to terminate unintended pregnancies; they correlate with findings from other countries as well. See

for abortion permitted by the 1977 legislation; its repeal in 1979 undermined the significance of the entire abortion reform. Moreover, the repeal of the socioeconomic clause had a disparate impact on married women in need of abortion. Due to religious interests in encouraging "proper" family models, unmarried women were granted automatic and unrestricted permission to terminate a pregnancy regardless of specific personal, social, or economic circumstances.⁸⁰ For married women, on the other hand, the socioeconomic clause had provided the only possible means of access to an abortion aside from the medical, criminal, and adultery grounds. Thus, following the socioeconomic clause's repeal, the formal scope of access to abortion for married women was drastically diminished. These women were left without legal access to abortion in the vast majority of cases in which they sought to terminate an unwanted pregnancy.⁸¹ For married women, the formal scope of the abortion law became so narrow as to be mostly irrelevant in terms of responding to their actual reproductive needs.

In 1979, when it became apparent that a majority of legislators planned to vote for the repeal of the socioeconomic clause, MK Chaika Grossman was outraged. She admitted during the final parliamentary deliberations that the current abortion law, which she had defended intensely just two years prior, was not the law that she had hoped it would be. Directly addressing one of the members of the ultra-Orthodox Party, MK Grossman said:

The law that we enacted, I admit it, is not my cup of tea; it was a law of compromise. You sat in the [Public Services] Committee and you saw what compromises we made to come up with something that was [in line with] national consensus. [Now] you are breaking [with] the national consensus.⁸²

Akinrinola Bankole, Susheela Singh & Taylor Haas, *Reasons Why Women Have Induced Abortions: Evidence from 27 Countries*, 24 INT'L FAM. PLANNING PERSP. 117 (1998); Geraldine Faria, Elwin Barrett & Linnea Meany Goodman, *Women and Abortion: Attitudes, Social Networks, Decision-making*, 11 SOC. WORK & HEALTH CARE, 85, 85-99 (1985); Sinnika Sihvo et al., *Women's Life Cycle and Abortion Decision in Unintended Pregnancies*, 57 J. EPIDEMIOLOGY & COMMUNITY HEALTH 601, 601-05 (2003); Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLANNING PERSP. 169, 169-76 (1988).

80. See *supra* notes 59-60 and accompanying text.

81. A study conducted shortly after the Abortion Law was passed by the Knesset in 1977, and before the repeal of the socioeconomic clause, provides relevant data that support this claim. The study, which investigated patterns of applications to the Pregnancy Termination Committees among married women, revealed that most of these women relied on socioeconomic considerations when requesting abortions. Specifically, married women referred to the number of children in their household, the age of their youngest child, insufficient family income, and housing difficulties as the primary factors affecting their desire to terminate an unintended pregnancy. PELED & BACKMAN, *supra* note 46, at 32-33.

82. DK (1979) 1130 (Isr.).

Other members of the Labor Party tried to revive rights-talk, citing the correlation between legal access to abortion and the status of women in society.⁸³ At this point, however, it was too late. The same conceptual framework that served to justify the original bill—that of national and religious concerns devoid of any regard for individual rights—paved the way for another political compromise. The repeal of the socioeconomic clause was legitimated by the religious concerns cited by ultra-Orthodox members of the Knesset. Conservative MKs from the right-wing Likud Party who were ambivalent about the socioeconomic clause to begin with (due to national-demographic concerns) sympathized with the religious demand to abolish this clause altogether. The religious arguments resonated with the Likud MKs' national-demographic concerns regarding birthrates among Jewish women.⁸⁴ The scope of the initial abortion reform was delineated by demographic concerns and religious Jewish concerns about "proper" families and "proper" children. These same concerns ultimately served as the primary rationale for the subsequent repeal of the socioeconomic clause.

These developments led to the formulation of abortion legislation that is simultaneously too narrow and too broad. On the one hand, following the repeal of the socioeconomic ground out of a complete disregard for women's reproductive needs and rights, the law became extremely narrow and therefore insufficient in responding to the actual needs of women (especially married women) seeking to terminate an undesired pregnancy. On the other hand, in the absence of a clear conception of rights regarding the status and interests of the fetus, the legislature enacted a law that is very broad and makes no distinction whatsoever between the various stages of pregnancy as they pertain to the grounds for abortion. As a result, the abortion committees were granted unlimited discretion to determine whether gestation age should be a relevant factor in granting abortion approval. The following Section explores the various implications of these two problematic features of Israeli abortion legislation.

83. Shoshana Arbeli Almozlino of the Labor Party argued that this law was "inextricably linked to the status of the woman in Israel." *Id.* at 1125. Eliyau Moyal from the same party added that the proposed amendment to the law was designed to "discriminate against the woman." *Id.* at 1126.

84. Yael Yishai argues that the religious arguments resonated with the right-wing Likud Party's vision of Greater Israel. The capture of the Palestinian territories of the West Bank and Gaza during the Six-Day War of 1967 brought more than one million Arabs under Israeli control, in addition to the hundreds of thousands already living in Israel before 1967; this intensified the demographic anxiety and provided additional justification for abolishing the socioeconomic clause. YISHAI, *supra* note 4, at 220.

II. WHEN ABORTION LAWS FAIL TO REGULATE

By the late 1980s, it became clear that the repeal of the socioeconomic clause had failed to produce the expected reduction in the number of abortions performed annually.⁸⁵ Surveys suggested that the Pregnancy Termination Committees, which, as the primary enforcement agents of the legislation, were expected to be the gatekeepers of abortion approvals, were in fact employing lenient approval policies.⁸⁶ The Committees' liberal policies, in turn, contravened the religiously based efforts to reduce the number of abortions. As a result, political pressure for greater control over the work of these Committees grew. This pressure was particularly focused on Committees in private hospitals, where most approved abortions took place.⁸⁷ In 1989, one of the ultra-Orthodox parties in the Knesset proposed an additional amendment to the law that aimed to eliminate the Pregnancy Termination Committees working in private hospitals.⁸⁸ This proposal was eventually set aside due to internal political developments within the government coalition.⁸⁹ When the option of adding another legal restriction to the legislation became irrelevant, the religious forces in government sought the intervention of the Minister of Health, who was tasked by law with upholding the abortion arrangement.⁹⁰

85. SALZBERGER ET AL., *supra* note 15, at 15; Delila Amir & David Navon, *The Politics of Abortion in Israel* 56 (Pinchas Sapir Ctr. For Dev., Working Paper No. 13-89, 1989). Specifically, the relevant figures reveal that in 1979, the number of authorized abortions was 15,925. *Id.* In 1982, this figure increased to 16,829. *Id.* In 1984, legal abortions reached a record high of 18,948. *Id.*

86. SALZBERGER ET AL., *supra* note 15, at 13.

87. Pregnancy Termination Committees operate in Israel in both public and private hospitals. In private hospitals, a woman seeking an abortion can choose her doctor; accordingly, the cost of the medical procedure is considerably higher. Relevant data in the 1980s indicated that two-thirds of all authorized pregnancy terminations were performed in private hospitals. These figures became a source of concern for religious politicians who suspected that Pregnancy Termination Committees in private hospitals might employ a more liberal interpretation of the law when granting approval. These suspicions led to the appointment of yet another abortion committee, the Shenkar Committee, which recommended that all private hospital committees be abolished. YISHAI, *supra* note 4, at 221-22; Morag-Levine, *supra* note 49, at 329-330. However, a close analysis of these figures indicates that about half of the abortions performed in private hospitals were approved by public hospitals' abortion committees. For instance, in 1988, private hospitals approved 5,352 pregnancy terminations but performed 10,047 of the 15,255 total abortions performed that year. This pattern was evident in subsequent years as well. See CENTRAL BUREAU OF STATISTICS, STATISTICAL ABSTRACT OF ISRAEL no. 42, §3.25 (1991). These latter figures suggest that women who could afford the extra cost preferred private hospitals not because of a more liberal approval policy employed there, but simply because they offered better medical care.

88. This draft bill linked the licensing of Pregnancy Termination Committees in private hospitals to the specific approval of the Ministry of Health. See Draft Bill of Amendment to the Penal Law (Amendment No. 30), 5749-1989, HH No. 1950 (Isr.).

89. The proposal passed only the first vote in the Knesset and was then shelved. YISHAI, *supra* note 4, at 228.

90. Section 321 of the Penal Law provides that the Minister of Health is responsible for upholding the abortion provisions of the Penal Law. This section authorizes the Minister to issue administrative regulations for the proper implementation of this arrangement. Penal Law, 5737-1977, SH No. 864 p. 226 (Isr.).

A. The Re-emergence of Socioeconomic Considerations

In 1991, the Minister of Health appointed a public commission known as the Riftin Commission to examine the manner of enforcement of the Penal Law sections pertaining to abortion approval by the Pregnancy Termination Committees. After one year of data collection, analysis, and deliberations, the Riftin Commission submitted its final report, which included specific recommendations regarding oversight of the approval policies of Pregnancy Termination Committees in both private and public hospitals.⁹¹ The specific tasks of the Commission, as outlined in the introduction to its report, indicate that the central concern motivating this public inquiry was the wide variation in the approval policies of the different Pregnancy Termination Committees.⁹² As part of its investigation into the operation of these Committees, the Riftin Commission examined 743 cases heard by the Pregnancy Termination Committees in various hospitals.

The main problem identified by the Riftin Commission pertained to the fourth ground for abortion permitted by Section 316(a)(4) of the Penal Law: where “continuation of the pregnancy may . . . cause physical or mental harm to the woman.”⁹³ The Riftin Commission found a significant discrepancy between the Committees’ decisions to approve abortions and the formal requirements of the law. In all but one of the hospitals examined, the Pregnancy Termination Committees used this section to grant approval for abortions in cases in which the grounds were in fact socioeconomic, not medical. Over 70% of applications to the Committees citing “mental harm” were actually based on socioeconomic circumstances.⁹⁴ This finding implied that, in practice, the Committees relied exclusively on circumstances of social or economic hardship as an indication that a pregnancy might endanger the woman’s mental health.

A similar discrepancy—though at a significantly lower rate—between the letter of the law and actual decisions to grant approval for abortion was also found with respect to Subsection 316(a)(3), which deals with concerns for the health of the fetus.⁹⁵ In this context, the Riftin Commission determined that the Pregnancy Termination Committees were lenient with regard to the type of medical documentation required to establish the existence of circumstances that would justify abortion due to physical or mental defects in the fetus. In sum, the

91. Report of the Commission for Examining the Implementation of the Penal Law (1992), <http://www.health.gov.il/PublicationsFiles/riptin.pdf> [hereinafter Riftin Commission Report] (examining the implementation of sections in the Penal Law that pertain to pregnancy termination).

92. Specifically, the Commission was given three tasks: (1) to examine the operating procedures of the Pregnancy Termination Committees in public and private hospitals; (2) to examine the level of suitability of such procedures to the provisions of the law; and (3) to examine the involvement of physicians who were members of these Committees in the actual performance of abortions. *Id.* at 1.

93. Penal Law, 5737-1977, SH No. 864 p. 226 (Isr.).

94. See Riftin Commission Report, *supra* note 91, at 5.

95. The discrepancy with regard to this ground amounted to 41% on average, ranging from 45% in private hospitals to 39% in public hospitals. *Id.* at 4-5.

Riftin Commission found that there was a gap between the formal requirements of the law and the actual circumstances that motivated the Committees' decision-making with regard to both the medical-mental ground and the fetal health ground.

Thus, in 1992, it became clear that the socioeconomic ground, despite being formally stricken from the law in 1979, actually continued to serve as a significant basis for abortions in Israel. Furthermore, the picture drawn by the Riftin Commission was one in which the Pregnancy Termination Committees that were designed to serve as the law's enforcers had in fact become key players in re-drawing the legal boundaries of abortion approvals. Instead of serving as technical enforcement bureaucracies, these Committees began expanding access to abortion by formulating circumventing routes based on a very broad and flexible interpretation of the phrase "mental harm" used in the law. In the absence of a legal path for a significant number of women seeking abortions, and in light of what appears to have been the medical community's desire to secure medically safe abortions for women, alternative mechanisms for abortion approval were gradually created. These mechanisms were implemented parallel to the law rather than within it. Instead of driving women who sought abortions based on socioeconomic considerations to receive abortions "underground" and without proper medical supervision, the Committees created a way for these women to obtain their approval for (il)legal abortions.⁹⁶

A similar explanation likely applies to the second significant finding of the Riftin Commission, relating to the ground for abortion based on fetal defects. In this context as well, it appears that the practice indicated by the Commission—whereby Pregnancy Termination Committees practiced relative leniency when granting abortion approvals based on this ground—was done in order to address the intolerable gap between the narrow letter of the law and women's real and broad need for safe, accessible abortion. It would thus seem that under the pretext of "risk to the health of the fetus," any woman seeking to terminate an unwanted pregnancy was able to do so. In such cases, the women likely obtained some medical certificate attesting to their having taken a certain medication or having undergone medical treatments not recommended for pregnant women. The Committees would then base their decisions to approve abortions on said documentation, without further medical inquiries.⁹⁷

96. This pattern of disguising socioeconomic circumstances in the women's health ground was identifiable immediately after the repeal of the socioeconomic clause. In 1979, the only full year in which the socioeconomic clause was in effect, 6,331 pregnancy terminations (out of a total of 15,925) were performed based on this ground, and only 1,299 were based on the women's health ground. In 1982, when the socioeconomic ground was no longer a legal ground for abortion, 5,796 of abortions (out of a total of 16,829) were based on the women's health ground. Amir & Navon, *supra* note 85, at 85. Hence, in a period of two years following the repeal of the socioeconomic clause, the women's health ground became the central ground upon which pregnancy terminations were approved, clearly replacing the repealed socioeconomic ground.

97. My personal experience attests to this conclusion. In 1989, as a young married woman, I experienced an unintended pregnancy, and was unable to meet any official criteria for a legal abortion. My

In both instances, it can be assumed that the law-circumventing routes developed by the Committees were aimed primarily at accommodating the needs of married women. While unmarried women were granted automatic and unrestricted permission to terminate pregnancies, the vast majority of married women who sought to terminate pregnancies depended on the availability of socioeconomic grounds for abortion. Thus, the needs of married women appear to have been the primary reason for the lenient approval policies developed by the Pregnancy Termination Committees following the official repeal of the socioeconomic clause.

The Riftin Commission was severely critical of this situation, in which it found "no compatibility between the decision to approve abortions and the provisions of the Law."⁹⁸ The Commission recommended a number of significant changes in the operation of the Committees, with the intent of creating said compatibility. Interestingly, the report refrained from discussing the circumstances that might have induced the development of these law-circumventing routes and focused exclusively on outlining a set of recommendations designed to reinforce the exclusion of socioeconomic considerations from the deliberations of the Pregnancy Termination Committees. The Commission's main recommendation was as follows: in cases in which claims were made regarding risk to the woman's mental health, such claims must be based on the written opinion of an expert psychiatrist and must include a diagnosis of a recognized clinical psychiatric disorder (such as postpartum psychosis).⁹⁹ The Commission thus sought to significantly narrow the Committees' interpretation of the "mental grounds" for abortion to include only circumstances where it could be clinically established that the woman suffered from a recognized psychiatric disorder. The goal was to prevent the Pregnancy Termination Committees from granting approval for abortions in cases where it appeared that a correlation could exist between the woman's socioeconomic condition and mental distress. A similar recommendation to the one aimed at reducing the number of abortion approvals based on medical grounds was also formulated regarding the fetal defect ground.¹⁰⁰

The Riftin Commission's recommendations were adopted by the Minister of Health shortly after the publication of the Commission's report. The Minister of Health, who is tasked by law with upholding the abortion arrangement, is authorized to issue administrative regulations for the proper implementation of the law.¹⁰¹ These regulations are issued by the Director General of the Ministry of Health in the form of official directives. In 1993, a Director General's directive

only option for obtaining a Committee's approval for pregnancy termination was to obtain a medical certificate that indicated that I took some medication that is not recommended for pregnant women due to a potential risk to the fetus.

98. Riftin Commission Report, *supra* note 91, at 7.

99. *Id.* at 6-7.

100. *Id.* at 7.

101. See *supra* note 90 and accompanying text.

embraced the Riftin Commission's recommendations as formal Ministry policy.¹⁰² The directive stressed that this newly announced policy must be "strictly and consistently performed."¹⁰³ Thus, as of 1993, legal access to abortion had been narrowed through stricter limitations on the discretion of the Pregnancy Termination Committees. The political impetus for this move was quite clear. The Riftin Commission was appointed in response to political pressures by the religious forces in government. Hence, the Minister of Health, in his role as the government official in charge of regulating the approval policies of the Committees, was politically committed to strict enforcement of the law. The government's coalition agreement with the ultra-Orthodox parties left no room for social and economic grounds for abortion approvals following their repeal in 1979. While the Pregnancy Termination Committees appeared to have been concerned with the actual reproductive needs of women seeking abortions—and particularly with the needs of married women—and therefore tried to accommodate as many abortion requests as possible within the existing legislation, the Minister of Health appeared to have been primarily concerned with restricting abortion requests that were not explicitly permitted by the law. This begs the question: how did the Minister's intervention in the work of the Pregnancy Termination Committees in order to draw narrower boundaries for abortion approvals affect married women's access to legal abortion in cases of unwanted pregnancy?

A detailed analysis of data regarding changes in the scope and characteristics of abortion approvals from the early 1990s through today provides an intriguing answer to this question. While the Minister's directive, based on the recommendations of the Riftin Commission, succeeded in reducing the number of abortion approvals based on medical grounds, this move did *not* achieve its ultimate goal of reducing the total number of abortion approvals granted. Indeed, official reference to medical grounds clearly declined following the Minister's intervention. However, other grounds for abortion became more popular over the following years, providing alternative legal paths for married women seeking to terminate unwanted pregnancies. The following Section discusses the substance and significance of these findings.

B. The Rise of the Adulterous Woman

The most recent official data regarding pregnancy termination in Israel, published by the Ministry of Health, indicate that the primary official reason for which women in Israel terminate pregnancies is pregnancy out of wedlock.¹⁰⁴

102. Director General Directive 23/93 Compliance with the Law and Regulations by the Pregnancy Committees, Operational Guidelines, Ministry of Health, Israel (Nov. 14, 1993), http://www.health.gov.il/hozer/mk23_1993.pdf.

103. *Id.*

104. *Pregnancy Terminations by the Law, 1990-2014*, DATA DIVISION, MINISTRY OF HEALTH 11-15 (Dec. 2015), http://www.health.gov.il/publicationsfiles/preg1990_2014.pdf.

More than half of abortions in 2014 were performed in accordance with Section 316(a)(2) of the Penal Law.¹⁰⁵ Although this Section includes the grounds of rape and incest as well as the “out of wedlock” ground, the Ministry’s report itself clarifies that abortion approvals based on this section are mostly attributed to pregnancy out of wedlock.¹⁰⁶ This fact is also compatible with general data indicating that rape and incest constitute a very small portion of the cases in which women request abortions.¹⁰⁷ Moreover, according to the Ministry of Health’s statistics, nearly half of the annual abortion approvals are granted to married women. This figure has remained relatively constant over time and generally ranges between 41% and 45%.¹⁰⁸ Considered together, these two facts—that the most popular ground for legal abortion is the one pertaining to pregnancies conceived out of wedlock, and that nearly half of the applicants for abortions are married women—are particularly revealing. Given that a large portion of the women who received legal abortions in Israel in the past two and half decades were married, and assuming that, in most instances, the reason for abortion was social, and not medical or criminal, one is led to conclude that a woman seeking a legal abortion would be compelled to frame her reasoning in terms that conform to the precise letter of the law. Of the four available grounds provided in the law—the woman’s age, pregnancy out of wedlock, the woman’s health, and the fetus’ health—the main ground that *currently* allows for some leeway for applicants is “pregnancy out of wedlock.” This ground is open not only to single women, but also to married women who have had extramarital sexual relations, or to those who claim to have done so in order to obtain the desired abortion approval.

An extremely high proportion (53.1%) of abortion approvals are granted based on this ground. This seems to attest to the fact that some of the married women seeking to terminate an unwanted pregnancy find refuge in this provision and are compelled to lie about the nature of their pregnancy in order to obtain

105. Specifically, the Report reveals that 53.1% of all pregnancy terminations in 2014 were approved based on the “out of wedlock” ground. In absolute numbers, this amounted to 10,330 abortions out of a total of 19,356. *Id.*

106. While mentioning Section 316(a)(2) of the Penal Law as the official legal ground for approving this type of request for abortion, the Report refers to “out of wedlock” as the specific category in the section on which these requests may be approved. *Id.*

107. This fact was also acknowledged by the Minister of Health back in 1975. While presenting the proposed abortion reform in the Knesset, the Minister explained: “It is an open secret that only a small portion of abortion[s] are performed due to legal grounds such as rape. . . . Most [women] . . . terminate an out of wedlock pregnancy or unintended pregnancy.” DK (1975) 1322 (Isr.). Studies in the United States reveal similar data regarding the marginality of criminally related reasons for abortion. A comprehensive study in the United States that involved 1,209 abortion patients found that rape accounted for 1% of reasons for abortion and incest for less than 0.5%. These figures remain unchanged over time. See Finer et al., *supra* note 79, at 113.

108. *Pregnancy Terminations by the Law*, *supra* note 104, at 40. Earlier data from the late 1970s and 1980s indicate that this has always been the case. Delila Amir and David Navon’s study of 489 abortion requests handled by Pregnancy Termination Committees from 1978 to 1986 reveals that, ever since the enactment of the reformed abortion law, married women have constituted nearly half of the applicants to the Committees. Amir & Navon, *supra* note 85, at 52.

the desired approval. It appears that a false statement whereby the pregnancy is declared to be the result of extramarital intercourse is currently the primary path available to married women seeking abortion approval from the Pregnancy Termination Committees. It should be noted that this conclusion is supported not only by statistical data respecting the centrality of the “pregnancy out of wedlock” ground within the total approvals granted for abortions annually, but also by anecdotal information gathered over the years from women who actually underwent this procedure and confessed anonymously in various media reports that lies about adultery paved their way to legal abortion.¹⁰⁹

Alongside the ground of pregnancy out of wedlock, one-fifth of pregnancy terminations are performed for reasons relating to the woman's health.¹¹⁰ This is a relatively high rate compared to other developed countries. While in the United States pregnancy terminations due to concerns for the health of the mother account for approximately 10% of legal abortions,¹¹¹ in Israel the rate is almost double that. Such data may also indicate that married women seeking to terminate an unwanted pregnancy find some degree of refuge in this provision as well, even in cases that do not meet the psychiatric standard that is currently imposed by the Minister of Health's directive. An official report that was recently published by the State Comptroller's Office confirms this assumption and determines that some abortion committees refrain from demanding official psychiatric evaluation of a pregnant woman as required by the Minister of Health's directive, instead accepting as sufficient the woman's own testimony that she suffers from mental distress as a result of the pregnancy.¹¹² Several other committees view a letter from a family doctor as sufficient, rather than one from a registered psychiatrist.¹¹³ However, although there may be a limited trend of leniency regarding this provision, it is important to note that the Minister's directive—which limited the Committees' discretion with regard to the mental health ground and required a clinical diagnosis of a recognized psychiatric disorder for abortion approval—did lead to a significant decline in such abortions. The number of

109. See, e.g., Einat Sagi Alfasa, *What's the Problem? Lie and Say the Pregnancy is Not From Your Husband*, YNET (May 2, 2013), <http://www.ynet.co.il/articles/0,7340,L-4374951,00.html>; Roni Linder-Ganz, *The Right to Have an Abortion Without Being Interrogated*, HA'ARETZ (Nov. 15, 2013), <http://www.haaretz.co.il/misc/iphone-article/.premium-1.2166226>; Aviva Lori, *Lies I Told the Committee*, HA'ARETZ (Aug. 8, 2007), <http://www.haaretz.co.il/misc/1.1127665>; Sagit Pasteman, *Abortion in Israel: Why Women Have to Lie?*, SALOONA (Oct. 21, 2013), <http://saloon.co.il/blog/%D7%94%D7%A4%D7%9C%D7%95%D7%AA-%D7%91%D7%99%D7%A9%D7%A8%D7%90%D7%9C-%D7%9C%D7%9E%D7%94-%D7%A0%D7%A9%D7%99%D7%9D-%D7%A6%D7%A8%D7%99%D7%9B%D7%95%D7%AA-%D7%9C%D7%A9%D7%A7%D7%A8/>.

110. The exact figure was 18.6% in 2014. *Pregnancy Terminations by the Law*, *supra* note 104, at 14.

111. For instance, 12% of women surveyed in 2004 in the United States reported that they decided to have an abortion because of a “physical problem with my health.” *Finer et al.*, *supra* note 79, at 113.

112. The Office of the State Comptroller examined the work of the abortion committees for a period of several months in 2014 and 2015. Its findings were published as part of its 2015 annual report. See STATE COMPTROLLER OFFICE, ANNUAL REPORT 695 (2016).

113. *Id.*

abortions in this category per 1,000 women of reproductive age has decreased by 50% since 1990.¹¹⁴ This is the most dramatic decrease recorded regarding any of the grounds for abortion approval. There can be no doubt that the Minister's directive played a decisive role in prompting this change.¹¹⁵

Additional official data further support the assumption that, rather than using the medical ground, married women now mostly rely on the "out of wedlock" ground in their efforts to obtain legal abortions. Perusal of the trends in abortion approvals granted over the years shows a significant increase in the relative rate of use of the "out of wedlock" ground as compared to other grounds. While in 1990, before the Minister's directive went into effect, pregnancy terminations based on the "out of wedlock" ground constituted 41.4% of all pregnancy terminations, by 2014 this figure had increased to 53.1%.¹¹⁶ The most significant increase occurred in the years following the Minister's directive that restricted the discretion of the Committees with regard to the woman's mental health ground.¹¹⁷ Moreover, the relative rate of abortion approvals based on the "out of wedlock" ground increased parallel to the relative decrease in the rate of approvals based on the woman's mental health ground.¹¹⁸ There appears to be a clear correlation between these two trends. This fact, in turn, further supports the conclusion that the main refuge of married women seeking to terminate an unwanted pregnancy through existing legal mechanisms is currently found in the ground of pregnancy "out of wedlock." In the absence of any other available legal ground not based on medical or criminal circumstances, many married women are apparently compelled to make false statements regarding the circumstances of their pregnancies, and the medical community is apparently inclined to accept these statements to provide safe pregnancy termination procedures in established medical institutions to this large group of women.

In sum, following the intervention of the Minister of Health in the work of the Committees in the early 1990s, the efforts made by the Pregnancy Termina-

114. *Pregnancy Terminations by the Law*, *supra* note 104, at 13. Reproductive age is defined as between 15 and 49.

115. It should be noted that the overall decrease in the rate of usage of the woman's health provision greatly surpasses the general decrease in the total number of pregnancy terminations performed per capita since the 1990s, which stands at 26%. Moreover, the most dramatic decrease in the rate of usage of the woman's health provision was recorded between 1990 and 2000, the decade that immediately followed the issuance of the Minister's Directive. *Id.* One can therefore draw a link between the Minister's intervention in the Committees' work with regard to the woman's mental health provision and the dramatic decrease in the use of this ground by the Pregnancy Termination Committees as a legal justification for abortion approval.

116. *Id.* at 14. This change amounted to an increase of 60% in the number of abortions performed based on this ground (6,417 in 1990 as opposed to 10,330 in 2014). *Id.* at 15.

117. In 1990, 41.4% of abortion approvals were based on "out of wedlock" considerations. In 1995, this number increased to 47.8%, and in 1999 it reached a record high of 54%. This figure has remained relatively steady since then. *Id.*

118. In the decade between 1990 and 2000, the relative percentage of abortions based on the woman's health ground decreased from 27.5% to 19%, while the parallel figure for "out of wedlock" pregnancy terminations increased from 41.4% to 53.9%. *Id.* at 14.

tion Committees to expand married women's legal access to pregnancy termination, previously focused on the medical ground, were diverted to the pregnancy "out of wedlock" ground. This ground has become the primary law-circumventing route for abortion approval today, largely replacing the old circumvention routes of the 1980s.

C. Viability Becomes an Additional Criterion for Abortion Approval

In 1994, a year after his first attempt to discipline the Committees by limiting their discretion regarding the woman's mental health ground for abortion, the Minister of Health again intervened and introduced another significant change to the abortion approval procedure. As opposed to the first intervention, however, it appears that this time the Minister acted in response to a request from the Committees themselves, rather than as part of the struggle to enforce the abortion legislation. In another Director General's directive, the head of the Medical Services Division in the Ministry of Health restricted the authority of the Pregnancy Termination Committees in dealing with late-term abortions.¹¹⁹ Specifically, it was determined that the Committees could approve an abortion request only when it involved a pregnancy of no more than twenty-three weeks.¹²⁰ With regard to the approval procedure for later-term abortions, the new directive ordered the establishment of six Higher Regional Boards, each consisting of five members.¹²¹ These new boards were granted exclusive authority to approve requests for late-term pregnancy terminations.

Thus, that which the legislature initially refrained from doing—determining whether the stage of gestation and fetal viability should be relevant considerations in abortion approvals—was ultimately done by the Minister of Health through an administrative directive. This directive established a new medical forum, the Higher Regional Boards (mention of which is not found in the existing law), to deliberate on late-term abortions where questions relating to fetal viability were pertinent. The authority of the Pregnancy Termination Committees was thus restricted again, contrary to the language of the law, and they were denied authority to approve requests for abortion in cases involving pregnancies of more than twenty-three weeks. This directive went into effect in 1995, and with it, yet another law-circumventing route was paved as the result of the Ministry of Health's intervention in the substantive content of the law.

It may be assumed that this directive was the fruit of collaboration between the Pregnancy Termination Committees and the Minister of Health. The absence of any reference to viability in the language of the law had left the Committees

119. Director General, Directive 76/94: Higher Regional Boards for Pregnancy Terminations in Pregnancies of More than 23 weeks, Ministry of Health (Dec. 28, 1994), http://www.health.gov.il/hozer/mk23_2007.pdf.

120. *Id.* at 2.

121. *Id.* at 1.

without any normative guidance as to how to exercise discretion regarding late-term abortions. While the most liberal European legislation at the time granted discretion respecting late-term abortions to a special medical forum,¹²² Israeli legislation did not distinguish between first-trimester abortions and last-trimester abortions, thus presenting the Committees with difficult cases of late-term abortion requests. In such a state of affairs, it may be assumed that the initiative to establish a new organ with expertise in dilemmas regarding late-term abortions came directly from the Committees themselves. Support for this assumption is found in the fact that the new directive regarding the establishment of the Higher Regional Boards was accepted and enforced by the Pregnancy Termination Committees immediately after its publication. While the scope and substance of the women's mental health ground became a battleground between the Minister of Health and the Committees, and contemporary data suggest that the Committees partly resist the instructions of the Minister in that context,¹²³ there is no parallel evidence regarding the establishment of the Higher Regional Boards.

The new boards began to operate immediately after the Minister's order, without any documented resistance from the local Committees. At the same time, despite the perceived cooperation of the Committees in implementing the new directive, it should be acknowledged that the establishment of the Higher Regional Boards was not a mere procedural matter deriving from the Minister of Health's technical enforcement authority under the law.¹²⁴ It constituted a substantial intervention in the existing legal abortion arrangement, including the establishment of a new organ not mentioned in the law. It also constituted an explicit violation of the authority of the Pregnancy Termination Committees, which were granted the exclusive authority to approve pregnancy terminations by Knesset legislation.

The Minister of Health was apparently aware of this difficulty when establishing the Higher Regional Boards. In 2007, in an attempt to resolve some of the problems involved in the Minister's intervention in the work of the Committees, officials at the Ministry of Health issued yet another directive, whose purpose was to reaffirm and expand the previous guidelines respecting the establishment of the Higher Regional Boards.¹²⁵ In its preamble, this new directive declared that the "Ministry of Health's instructions are in accordance with the Penal Law, and do not derogate or change its provisions."¹²⁶ In an attempt to reconcile the establishment of the Higher Regional Boards with the provisions of the law, the guidelines went on to clarify that the new boards actually constituted ordinary three-member Pregnancy Termination Committees to which two

122. *See supra* note 72.

123. *See supra* notes 110-115 and accompanying text.

124. *See supra* note 90.

125. Director General Directive 23/07: Pregnancy Termination Committees in the Stage of Viability, Ministry of Health (Dec. 19, 2007), http://www.health.gov.il/hozer/mk23_2007.pdf.

126. *Id.* at 1.

members were added in the capacity of "advisors."¹²⁷ Thus it stated that neither the deliberations of the Higher Regional Boards nor resolutions regarding pregnancy termination could be executed except in the presence of official Committee members, whose positions were decisive. In so doing, the Minister brought the arrangement of the previous directive considerably closer to the language of the law and partially resolved the difficulty.

At the same time, additional instructions created a new set of problems regarding the authority of the Minister of Health and the thin line between enforcing the law and circumventing it. The new directive provided that, since the Higher Regional Boards were to deliberate on questions of viability-stage abortion, they required special criteria for approving late-term abortion requests, different from the ordinary criteria provided by the law.¹²⁸ Specifically, the directive provided that, in late-term abortions where the legal ground for abortion is the woman's age, risk to the woman's health, illicit intercourse, or pregnancy out of wedlock, abortion approval shall only be granted in exceptional cases and based on weighty considerations.¹²⁹ With regard to the legal ground involving risk to the fetus' health, abortion may only be approved in cases of concern for severe developmental or physical disability.¹³⁰ In an attempt to justify these substantive additions to the abortion legislation, the directive went on to explain that "at the time the Law was legislated, the option of terminating a pregnancy during the viability stage, in the sense of causing the stillborn delivery of a viable fetus, was not available."¹³¹ Moreover, the directive clarified that reference to viability in any legal abortion regime is essential and that "there are Western countries where, despite strict protection of individual rights, pregnancy termination in the viability stage is banned or subject to stringent criteria."¹³²

Indeed, the viability stage and its impact on the scope of legal abortion is an issue that many Western countries addressed when formulating their legal arrangements regarding pregnancy termination. However, as shown in the first part of this Article, these facts were known to the Israeli legislature. Alongside the abortion bill eventually approved by the Knesset, there was another bill by MK

127. *Id.* at 3.

128. The Directive provides:

Pregnancy termination following approval of a pregnancy termination board during the viability stage means termination of the pregnancy after performance of medical procedures intended to ensure that the fetus is delivered stillborn. The will of the mother, though it should be respected, is not an exclusive and decisive consideration when deciding whether to approve termination during the viability stage, and other considerations as detailed hereunder must be considered even in cases where, in terms of the Law, there exist permitted grounds for pregnancy termination.

Id. at 5 (emphasis added).

129. *Id.*

130. *Id.* at 5-6.

131. *Id.* at 1.

132. *Id.*

Marcia Freedman, which centered on *Roe v. Wade*'s central holding.¹³³ Accordingly, MK Freedman explicitly referred to stages of pregnancy in her bill, distinguishing between first-trimester abortions and late-term abortions and subjecting the latter to a series of restrictions. Furthermore, after Freedman's proposal was set aside, several Members of the Knesset urged their colleagues to restrict the proposed grounds for abortion suggested by the Social Services Committee to first-trimester abortions. However, these suggestions were mostly ignored.¹³⁴ Thus, when the Israeli legislature formulated the existing abortion legislation, its members were well aware of the Western world's constitutional agenda, which included the acknowledgment of the potential impact of the viability stage on legislation regarding pregnancy termination. Nonetheless, the Israeli legislature disregarded this aspect of abortion legislation, since the primary concern of the majority of the Members of the Knesset in the 1970s was the promotion of the interests of the Jewish collective, rather than the rights of individuals in society. This led to the enactment of legislation that was simultaneously too narrow (with respect to the rights and needs of women) and too broad (with respect to relevant interests or rights pertaining to the fetus), and therefore unenforceable.

It can thus be argued that the same problematic aspects of the law that motivated the Pregnancy Termination Committees to develop law-circumventing routes for expanding married women's access to abortion also inspired the regulation of late-term abortion by the Minister of Health. In this respect, the current regulatory regime and the scope and substance of abortion approval are not governed by the law itself, but are rather determined by enforcement mechanisms that were developed by the law's enforcement agents but exist *outside* the law. What appears to be a legal abortion in Israel is in fact an illegal one. This understanding serves as a starting point for the following Section, in which the relevant lessons from the Israeli case are brought to bear on the American debate regarding the benefits of abortion compromises. In an attempt to further highlight the importance of a guiding framework of rights for developing proper abortion policies, the following Section also broadens the comparative analysis and discusses developments in abortion legislation in Canada, Germany, and France.

III. ABORTIONS BETWEEN LEGISLATIVE COMPROMISES AND RIGHTS-TALK

In 1973, when the United States Supreme Court announced its decision in *Roe v. Wade*, it appeared to be a stunning victory for American women. The Court ruled that the right to privacy under the Due Process Clause of the Fourteenth Amendment extended to a woman's decision to have an abortion.¹³⁵ For

133. Draft Bill of Amendment to the Penal Law (Abortions) 5734-1974, in DK (1975) 1334-1335 (Isr.).

134. See *supra* notes 73-75 and accompanying text.

135. *Roe v. Wade*, 410 U.S. 113 (1973). For a more detailed analysis of the central holding of *Roe v. Wade*, see *supra* note 7.

Israeli pro-choice advocates, *Roe v. Wade* represented a legal framework for abortion to which Israeli women could not be given access, in light of the significant compromises required as part of the give-and-take process in the legislature. In the absence of an Israeli constitutional bill of rights, the formation of abortion legislation depended exclusively on a majoritarian process in the legislature that was shielded from judicial review. Meanwhile, *Roe v. Wade* itself soon seemed to stimulate rather than discourage antiabortion measures. In the four decades that have passed since the ruling, numerous efforts have been made in Congress and state legislatures to curtail women's access to abortion.¹³⁶ Some of these initiatives were upheld by the Court and became effective in restricting access to abortion for a large number of women, especially poor women, minors, and rural women.¹³⁷ When the breadth and scope of the political controversy prompted by *Roe v. Wade* became clear, some legal scholars started to question the wisdom of *Roe v. Wade*, and to posit the superiority of a conciliatory legislative process of deliberation and compromise that is not centered on rights.¹³⁸

A. The Quest for Legislative Compromises

Roe v. Wade was not decided in a vacuum. In the early 1970s, there was a distinct trend toward abortion law reform in several states.¹³⁹ As it became clear that *Roe v. Wade*'s judicial intervention in this process had exacerbated, not resolved, the conflict over abortion, some legal scholars started to wonder whether *Roe v. Wade* unwisely undermined a pattern of legislative changes taking place across the nation. Ruth Bader Ginsburg wrote one of the earliest feminist critiques of *Roe*'s judicially imposed approach to abortion, describing legislative trends as a positive process in which "majoritarian institutions were listening and acting."¹⁴⁰ Reflecting on arguments in favor of a legislative solution to abortion

136. For one of the earliest feminist accounts of the scope and significance of *Roe*'s controversy and its impact on women's access to abortion, see Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985). For more recent accounts of state and federal legislative attempts to restrict women's access to abortion, see sources listed in *supra* note 8.

137. For a funding restriction approved by the Court, see *Harris v. McRae*, 448 U.S. 297 (1980). For restrictions on the use of state funds, facilities, and employees in performing, assisting with, or counseling on abortion, see *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). In 1992, the Court rejected the trimester framework that was developed in *Roe* and replaced it with the "undue burden" standard for abortion restrictions. Using the new standard, the Court upheld parental notification requirements and waiting period requirements. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 899, 886-87 (1992). The Court also upheld restrictions on second-trimester pre-viability abortions. See *Gonzales v. Carhart*, 550 U.S. 124 (2007).

138. Sylvia Law characterized the emergence of these trends in legal scholarship as "[t]he hunger for compromise." Sylvia Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 932.

139. Ginsburg, *supra* note 136, at 379-80.

140. *Id.* at 385.

that predated *Roe v. Wade*, Ginsburg concluded that a democratic solution to abortion at the legislature would be preferable to a judicially imposed one.¹⁴¹

Ginsburg's arguments were thoroughly developed in the late 1980s and early 1990s through the lens of comparative research in the work of Mary Ann Glendon.¹⁴² Inspired by the relative calm of abortion politics outside of the United States, Glendon conducted a search for alternatives by comparing abortion laws in twenty Western countries. Highlighting the benefits of strategic legislative compromises in this arena, Glendon argued that abortion reforms that were the products of the give-and-take of the legislative process brought about "humane, democratic compromise[s]"¹⁴³ and proved that "a divided society *can* compromise successfully on the abortion issue."¹⁴⁴ Her study revealed that most countries that reformed their abortion laws at the time took what Glendon termed "a middle position" on abortion.¹⁴⁵ Although Israel was not included in Glendon's study, her description of "a middle position" clearly resembled the Israeli legal framework: one which disapproves of abortion in principle, but permits it under circumstances deemed by the legislature to be "good causes." In reference to this type of legal model, Glendon argued that "in practice, in most of these countries it now seems quite easy for a woman legally to terminate an unwanted pregnancy in the first trimester."¹⁴⁶ Glendon concluded that, in contrast to legislative compromises on abortion in other countries, *Roe v. Wade*'s judicially imposed, rights-based approach to abortion has foreclosed the prospect of further statutory developments.¹⁴⁷

In a later work entitled *Rights Talk: The Impoverishment of Political Discourse*, Glendon focused more generally on the American preoccupation with individual rights and argued that rights talk "inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground."¹⁴⁸ Referring to abortion as one telling example of this problem, Glendon argued that constitutionalizing the abortion issue produced the worst of all possible solutions in that it left women their constitutional right to privacy, but little else.¹⁴⁹ In contrast, "compromise legislation"¹⁵⁰ in other Western countries

141. Specifically, she referred to the view of Second Circuit Judge Henry J. Friendly, who argued as early as 1970 in favor of the "superiority of the legislative solution" when describing what transpired when New York reformed its abortion law that year. *Id.* at 385-86.

142. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991); GLENDON, *supra* note 3.

143. GLENDON, *supra* note 3, at 18.

144. *Id.* at 19.

145. *Id.* at 13.

146. *Id.* Interestingly, this conclusion was later endorsed with reference to Israel as well. In one of a few commentaries that analyzed Israel's abortion legislation, Noga Morag Levine, inspired by Glendon's framework of analysis, concluded that "[Israeli [w]omen seem to have, for the most part, benefited from the terms of the Israeli abortion [c]ompromise." Morag-Levine, *supra* note 49, at 333.

147. GLENDON, *supra* note 3, at 24-25.

148. GLENDON, *supra* note 142, at 14.

149. *Id.* at 65.

150. *Id.* at 58.

gave substantial protection to women's interests, including public funding for abortion and social support for maternity and child-raising. Deepening her previous comparative analysis, Glendon focused specifically on the German¹⁵¹ and Canadian¹⁵² solutions and argued that these countries' legal solutions to abortion were superior to the American solution, since they placed greater reliance on legislation and compromise to create rules governing abortion.

Other commentators who surveyed abortion politics in Western countries reached similar conclusions, highlighting the benefits of legislative compromise.¹⁵³ However, some legislative solutions to abortion, such as the German legislative scheme, were criticized for being incoherent from a strict rights perspective.¹⁵⁴ Nevertheless, there appears to be a consensus among scholars engaged in comparative analysis that women ultimately benefit from the terms of legislative compromises on abortion that are not strictly rights-based, since compromise-based solutions usually lead to increased access to publicly funded legal abortions while judicially created, rights-based regimes like the United States' do not.

Robin West's work joins the call for legislative and policy solutions to abortion, but from a different perspective.¹⁵⁵ West's work focuses specifically on the feminist costs that result from reliance on adjudication and constitutional rights talk as the strategic vehicle for achieving legal abortion. Writing from a feminist and pro-choice perspective, West argues that conceptualizing legal abortion as an individual negative constitutional right and relying on adjudication as the strategic vehicle for developing and justifying this right has not served women well.¹⁵⁶ With *Roe v. Wade* on the books, abortion is becoming less and less available as the result of political and legislative decisions that are made far away from the Court.¹⁵⁷ Moreover, rather than promoting reproductive justice, the constitutional right to choose to have an abortion undermines the case for protecting the positive reproductive needs of men and women. These critical insights lead West to conclude that "engaged politics and civil compromise" on abortion at

151. *Id.* at 63-66.

152. *Id.* at 164-67.

153. Mary Ann Case, *Perfectionism and Fundamentalism in the Application of the German Abortion Law*, in CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW 93 (Susan E. Williams ed., 2011); Ofrit Liviatan, *Competing Fundamental Values: Comparing Law's Role in American and Western European Conflicts over Abortion*, in LAW, RELIGION, CONSTITUTION: FREEDOM OF RELIGION, EQUAL TREATMENT, AND THE LAW 385 (W. Cole Durham, Jr. et al. eds., 2013); Joyce Outshoorn, *The Stability of Compromise: Abortion Politics in Western Europe*, in ABORTION POLITICS: PUBLIC POLICY IN CROSS CULTURAL PERSPECTIVE 145 (Marianne Githens & Dorothy McBride Stenton eds., 1996); Kim Lane Scheppele, *Constitutionalizing Abortion*, in ABORTION POLITICS, *supra*, at 29.

154. Case, *supra* note 153, at 99.

155. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009).

156. *Id.* at 1396.

157. *Id.* at 1402-03.

the legislative level can better achieve the goal of establishing a positive network of reproductive support for both men and women.¹⁵⁸

As opposed to Glendon and others, who grounded their critiques in a comparative legislative study of other Western countries, West's critique is inspired by the general jurisprudence of "rights critiques."¹⁵⁹ She also advocates for a critical evaluation of *Roe v. Wade* from a progressive and pro-choice perspective. Similar to Glendon's argument and other previous arguments in favor of legislative solutions to abortion, West's declared goal is to secure women greater access to legal abortion and to respond more broadly to their reproductive needs.¹⁶⁰ Moreover, it appears that two similar themes underlie this diverse body of legal scholarship. The first theme challenges the wisdom of *Roe*'s constitutional rights-talk and judicially imposed approach to abortion regulation. The second theme highlights the possible advantages for women and for reproductive justice of resolving the abortion debate through a democratic process of political compromise at the legislature. The suggestion is that, if abortions were permitted in the United States as a result of a democratic legislative process of deliberation, conciliation, and compromise rather than judicial imposition of a strict concept of rights, the conflict over abortion would ease and women would gain access to publicly funded legal abortions. The Israeli case study, however, casts doubt on these contentions and provides a more complex picture that reveals not only the benefits of legislative compromises on abortion but also their potential harmful implications for women.

B. The Nuanced Facts of Legislative Compromises

The most recent abortion statistics in Israel, published by the Ministry of Health in December 2015, reveal that in 2014 98% of all requests for legal abortions were approved by the Pregnancy Termination Committees.¹⁶¹ The official record indicates that, while the annual approval rate was slightly lower in the early 1990s, this figure has steadily ranged between 97% and 98% over the past fifteen years.¹⁶² Moreover, additional data from other sources suggest that since the enactment of the law, the vast majority of women who approached the Committees were granted permission to terminate their pregnancies.¹⁶³ The approval statistics of the Committees could explain why the terms of the abortion compromise are still portrayed as beneficial for most women in Israel.¹⁶⁴ They might also explain the relatively small body of critical commentary that deals with the

158. *Id.* at 1421.

159. *Id.* at 1398.

160. *Id.* at 1425.

161. *Pregnancy Terminations by the Law*, *supra* note 104, at 10.

162. *Id.*

163. Amir & Navon, *supra* note 85, at 55.

164. Morag-Levine, *supra* note 49, at 333.

existing abortion legislation and the feminist reluctance to challenge the law or promote alternative legislation.¹⁶⁵ While commentators who addressed the issue of legal abortion in Israel have been critical of the legislative history that gave birth to the existing arrangement, most feminist scholarship in this area distinguishes between the restrictive language of the law and the practical reality in which women have wide access to legal abortion.¹⁶⁶ The relative availability of public funding further strengthens the tendency to describe abortion in Israel in positive terms.¹⁶⁷ Additionally, in the Ministry of Health's 2015 official report on patterns and characteristics of abortion approvals, Israel was ranked as having a relatively low number of abortions per capita. Compared to EU countries, Israel had the second-lowest percentage of pregnancy terminations per capita (after Croatia).¹⁶⁸ These figures together paint a positive picture in which almost every woman who approaches the Pregnancy Termination Committee is granted permission to have an abortion, and in which the country has simultaneously managed to significantly decrease the number of abortions in comparison to almost all EU countries.

However, as the previous Section of this Article reveals, the Israeli case study deserves a more nuanced analysis. An attempt to evaluate the law's impact on women by focusing on the Committees' approval of the vast majority of abortion applications obscures part of the story. This focus disguises three additional—and crucial—aspects inherent in the existing legal arrangement. First, the current regulatory regime and the scope of abortion approvals are not governed by the law itself, but rather by enforcement mechanisms that were developed by the law's enforcement agents but exist outside of the law. The intervention of these agents—the Pregnancy Termination Committees and the Minister of

165. There are exceptions, of course. See, e.g., YISHAI, *supra* note 4; Amir & Shoshi, *supra* note 28; Amir & Shoshi, *supra* note 67; Morag-Levine, *supra* note 49; Rimalt, *supra* note 72; Rebecca Steinfeld, *Wars of the Wombs: Struggles over Abortion Policies in Israel*, 20 ISRAEL STUD. 1 (2015). Delila Amir and Niva Shoshi argue that two factors can explain the feminist reluctance to challenge the current abortion law. The first is a sense that, at the end of the day, existing legislation is working and women have significant access to abortion. The second is a fear of backlash once the issue of liberalizing abortion law is raised. Amir & Shoshi, *supra* note 28, at 313.

166. For instance, Noga Morag-Levin distinguishes between Israel's "ad hoc liberal abortion policies" on the one hand, and its legal restrictions and public rhetoric disapproving of abortion out of religious and demographic concerns, on the other. Morag-Levine, *supra* note 49, at 332.

167. For many years, public funding was available for medically necessary abortions, to women who were victims of rape and to women under twenty or over forty. Women who did not meet these criteria had to pay for their legal abortions even when performed in a public hospital. In private hospitals, women have always had to pay for all types of legal abortion. In 2014, the age cutoff for publicly funded abortion was amended from twenty to thirty-three. Consequently, a greater proportion of pregnancy terminations are now part of the package of medical services included in the "health basket" that is provided, free of charge, to all Israeli citizens in public hospitals. This development caused one commentator to characterize Israel's abortion law as one of the "world's most liberal." Debra Kamin, *Israel Abortion Law Now Among World's Most Liberal*, TIMES OF ISRAEL (Jan. 6, 2014), <http://www.timesofisrael.com/israels-abortion-law-now-among-worlds-most-liberal/>. For a similar positive portrayal of abortion policies in Israel, see Yair Rosenberg, *On Israel's Liberal Abortion Policies*, TABLET (June 16, 2015), <http://www.tabletmag.com/scroll/191538/on-israels-liberal-abortion-policies>.

168. *Pregnancy Terminations by the Law*, *supra* note 104, at 44.

Health—in redrawing the boundaries of abortion regulation was prompted by the lack of a guiding rights framework from which to derive the proper scope of abortion approval. The absence of a clear concept of rights has rendered Israeli abortion law unenforceable since it is simultaneously too narrow (with respect to the rights and needs of women) and too broad (with respect to relevant interests or rights pertaining to the fetus). Hence, the law-circumventing enforcement mechanisms developed by the Committees in response to women's needs and by the Minister of Health in response to interests of the fetus are a direct result of unrealistic and unenforceable legislation that is devoid of any concept of rights. In practice, this means that what appear to be legal abortions in Israel are in fact illegal terminations of pregnancies.

The second aspect of the Israeli legal arrangement that is obscured by a primary focus on the high rate of approval pertains to married women, who are forced to lie in order to request and obtain legal abortions. In the past, these lies centered mostly on false medical claims portraying the pregnant woman as mentally fragile and therefore entitled to abortion based on the mental health ground. Today, the path to legal abortion involves a public (and potentially extremely shameful) declaration of adultery. True, many abortions that appear to meet the formal criteria of law are publicly funded.¹⁶⁹ However, public funding is dependent on abortion approval that meets a formal criterion enumerated by law. In the absence of legal, socioeconomic grounds for abortion approval, and in light of the fact that most women seek to terminate unintended pregnancies because of social and not medical or criminal reasons, often the only way for a married woman to receive a publicly funded legal abortion is to stand before a three-person Pregnancy Termination Committee and falsely present herself as an adulterer. Such a declaration is not only degrading, but it also carries potentially harmful consequences for these women in the future, particularly in divorce cases.¹⁷⁰

In addition, married women continue to make false claims regarding their mental states as an alternative route to obtain approval for a legal abortion. As discussed earlier, the relatively high number of abortions performed based on the women's health ground indicates that married women seeking to terminate an unwanted pregnancy find some degree of refuge in this provision as well.¹⁷¹ Lenient policies employed by some abortion committees allow women to make claims regarding their mental state without providing a formal psychiatric evaluation and in contravention of the Minister of Health's directive.

169. See *supra* note 167.

170. For example, in Jewish law, adultery constitutes a ground for divorce and may be a factor in property settlements, child custody decisions, and the denial of alimony. See generally Pascale Fournier, Pascal McDougall & Merissa Lichtsztral, *Secular Rights and Religious Wrongs? Family Law, Religion and Women in Israel*, 18 WM. & MARY J. WOMEN & L. 333 (2012).

171. *Supra* notes 110-115 and accompanying text.

Presenting oneself as “mad” or “bad” are therefore the most prevalent routes for married women seeking a legal abortion. Both options are equally degrading and potentially harmful. On the symbolic and practical level, married women are denied agency, autonomy, and bodily integrity. Abortion is approved only if one has been officially categorized as an unfit wife or an unfit mother. These categories can haunt women long after the abortion and lead to harmful consequences. Moreover, within this culture of lies, women’s access to abortion is not guaranteed and depends on the discretion of the abortion committees that have the sole power to decide whether to accommodate or deny the reproductive needs of women. Hence, public funding and access to legal abortion in Israel come with a heavy price tag, one involving a process that undermines women’s dignity, autonomy, and equality.

Finally, the failure of the legislation is also reflected in the large number of private illegal abortions performed in Israel annually. It may be safely assumed that some unintended pregnancies eventually find their way to the black market of abortion, as was the case during the period before the formulation of the existing abortion law. It is widely understood that Israel still has a significant black market for abortions.¹⁷² According to one estimate, at 19,000 per year, the number of illegal abortions equals the number of legal abortions.¹⁷³ The fact that doctors are rarely prosecuted and illegal abortions flourish reveals the reality that the legislation has ceased to matter, just as it did four decades ago, and abortion regulation itself is conducted in the shadow of the law. Moreover, illegal abortions often require women to jeopardize their health and assume a financial cost considerably higher than the customary cost of pregnancy termination procedures in the public health system.

In sum, the democratic process of lengthy deliberation in the legislature, which involved significant feminist compromises on the one hand and enjoyed wide consensus on the other, has not produced workable abortion legislation. To the contrary, unrestricted by judicial review or by the restraints of constitutional rights, the majority of Israeli legislators were free to ignore the reproductive needs and rights of women.

These insights regarding the failure of the Israeli abortion legislation provide a concrete example of the potential limitations of a majoritarian legislative resolution of the issue of abortion, especially when that resolution is not subject to judicial review. They highlight the importance of a guiding framework of rights for developing proper abortion policies and demonstrate how, in the absence of clear rights-talk, majority rule can lead to the enactment of legislation that disre-

172. Statistics from a 2013 survey commissioned by the New Family organization in Israel support this assumption. See Renee Ghert-Zand, *Black Market Abortions in Israel*, FORWARD (Feb. 5, 2013), <http://forward.com/sisterhood/170506/black-market-abortions-in-israel/>.

173. *Id.*

gards the rights, needs, and interests of vulnerable groups, such as women. Interestingly, despite unique characteristics of the Israeli case study, other comparative examples provide similar insights regarding the potential roles of rights, courts, and legislatures in shaping proper abortion policies.

C. Adding a Broader Comparative Perspective

Over the years, numerous commentators have employed the tool of comparative analysis to criticize *Roe v. Wade*'s strict rights-based and judicially imposed approach to abortion.¹⁷⁴ Canada, Germany, and France are three prominent examples that have attracted scholarly attention as part of the effort to strengthen the argument in favor of legislative, compromise-based solutions to abortion.¹⁷⁵ It appears, however, that developments in the decades since many of these commentators conducted their comparative analyses shed a different light on the significance of the process that shaped abortion policies in these countries. An analysis of these developments provides some intriguing insights regarding the role of the court and the role of the legislature in the process of legalizing and regulating abortion. These insights are particularly important when analyzed alongside the Israeli experience.

1. Canada

Abortion was decriminalized in Canada in 1988 as a result of the Supreme Court's decision in *Regina v. Morgentaler*.¹⁷⁶ The issue in *Morgentaler* was whether the section of the 1969 Canadian Criminal Code pertaining to abortion violated rights protected by the 1982 Canadian Charter of Rights and Freedoms. The statute in question, like the old British Mandatory law in Israel, had English origins. It made abortion a criminal offense except in cases in which a therapeutic abortion committee of three physicians certified that continuation of the pregnancy would likely endanger the life or health of the pregnant woman. The Canadian Court determined that the law and its therapeutic abortion committee provision violated the pregnant woman's right to security of the person, as guaranteed by Section 7 of the Charter of Rights and Freedoms, in that it made access to abortion contingent upon the vicissitudes of a committee's judgment. This violation could not be upheld under "the limitation clause" in Section 1 of

174. See *supra* notes 142-154 and accompanying text.

175. See, e.g., GLENDON, *supra* note 3, at 15-22 (France), 25-39 (Germany); GLENDON, *supra* note 142, at 63-66 (Germany), 164-67 (Canada); see also Case, *supra* note 153 (discussing the benefits of abortion compromises in Germany); Liviatan, *supra* note 153, at 391-95 (analyzing the benefits of compromises on abortion in France and Germany).

176. *R. v. Morgentaler* [1988] 1 S.C.R. 30, 32 (Can.).

the Charter¹⁷⁷ because the means the legislature had chosen to achieve the objective of protecting unborn human life were deemed by the Court to be often arbitrary and unfair.

Morgentaler was decided on narrow grounds. Unlike the U.S. Supreme Court in *Roe v. Wade*, the Canadian Supreme Court stopped short of striking down the existing abortion legislation and left the legislature with wide latitude to form a new system of abortion regulation. It acknowledged that state protection of the interests of the fetus “may well be deserving of constitutional recognition under Section 1”¹⁷⁸ and opened up the way for Parliament “to establish either a standard or a procedure whereby any such interests might prevail over those of the woman in a fair and non-arbitrary fashion.”¹⁷⁹ Hence, it avoided imposing an affirmative rights-based outline for abortion regulation, instead embracing the notion “that courts are not the appropriate forum for articulating complex and controversial programmes of public policy.”¹⁸⁰ At the time, it was plausible to expect, as Glendon and others did, that the legislature would soon act upon this judicial invitation to reconsider the question of abortion.¹⁸¹ However, the Canadian legislature has not been able to deal with this challenge. At the time of decriminalization, Canada was governed at the federal level by the Progressive Conservative Party. After *Morgentaler*, the Conservatives attempted to reintroduce criminal legislation against abortion; their effort failed.¹⁸² Canada today has no federal laws regulating or restricting abortion access.

In the absence of federal legislation, Canadian provinces and territories regulate abortion as a health care service.¹⁸³ Lacking a guiding rights-based framework for abortion regulation, the policies in the different provinces and territories vary with regard to access and funding, resulting in an apparatus that makes abortion inaccessible for many women.¹⁸⁴ For instance, abortion services were entirely unavailable on Prince Edward Island until very recently and are very limited in several other provinces, creating lengthy wait times.¹⁸⁵ In some provinces

177. Section 1 states: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.).

178. *Morgentaler*, 1 S.C.R. at 76.

179. *Id.*

180. *Id.* at 46. Studlar and Tatalovich characterized this aspect of the opinion as “a decision about appropriate regulations, not constitutional rights.” Donley T. Studlar & Raymond Tatalovich, *Abortion Policy in the United States and Canada: Do institutions Matter?*, in *ABORTION POLITICS*, *supra* note 153, at 75, 80.

181. GLENDON, *supra* note 142, at 165.

182. Joanna N. Erdman, *In the Back Alleys of Health Care: Abortion, Equality and Community in Canada*, 56 EMORY L.J. 1093 (2007).

183. *Id.* at 1094.

184. *Id.*; see also Kerri A. Froc, *Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice*, 42 OTTAWA L. REV. 411, 433-36 (2012).

185. For instance, in Manitoba two of fifty-two hospitals (4%) provide abortion services, while in New Brunswick the figure is one of twenty-eight (4%), and in Alberta six of 100 (6%). Michelle Siobhan Reid, *Access by Province*, ABORTION RTS. COALITION OF CAN., <http://www.morgentaler25years.ca/the->

and territories access to abortion is restricted by mandatory doctor referrals.¹⁸⁶ Gestation limitations that restrict access to abortion vary significantly from one province to another, ranging from twelve-week limits (in Yukon, Nunavut, and New Brunswick) to twenty-four-week limits (in Ontario).¹⁸⁷ Some provinces refuse to pay for medical abortions (as opposed to surgical abortions),¹⁸⁸ or for abortions performed in a clinic and not a hospital, although most induced abortions are performed in private clinics.¹⁸⁹ Despite decriminalization, new barriers now impede access to abortion in Canada. These barriers are often the work of bureaucrats, such as family doctors who refuse to provide referrals to abortion,¹⁹⁰ hospitals that do not provide abortion services,¹⁹¹ or provincial governments that refuse to publicly fund certain abortions.¹⁹² Abortion politics in Canada resemble those in Israel in the sense that the frameworks of rights that determine access to abortion are ultimately outlined by medical and administrative agents. The exact scope and substance of a woman's access to abortion and the exact scope and substance of state interests relating to the fetus are ultimately dependent on administrative decision-making, not on a federal legislative or judicial concept of individual constitutional rights.

struggle-for-abortion-rights/access-by-province/. On Prince Edward Island abortion services were not available for almost thirty-five years, until the province government announced only last March that it will finally move to provide such services. Sara Fraser & Jesara Sinclair, *Abortion Services Coming to P.E.I., Province Announces*, CBC NEWS (Mar. 31, 2016), <http://www.cbc.ca/news/canada/prince-edward-island/pei-abortion-reproductive-rights-1.3514334>.

186. In New Brunswick, a woman needs two doctors to approve her abortion request; in the Northwest Territories, Yukon, Nova Scotia, and in some hospitals in Saskatchewan, abortion services are subject to a physician referral. On Prince Edward Island, until very recently women had to request a referral from a physician to have their hospital abortion in another province covered by provincial health care. Reid, *supra* note 185.

187. *Id.*

188. In Yukon, Nova Scotia, and Alberta, abortions induced by medication are not covered. *Id.*

189. According to the most recent statistics published by the Canadian Institute for Health Information, more than half of induced abortions in Canada were performed in clinics (not hospitals) in 2013 (47,866 out of 82,869). *Quick Stats*, CAN. INST. FOR HEALTH INFO., <https://www.cihi.ca/en/quick-stats?xTopic=Hospital%2520Care&pageNumber=3&resultCount=10&filterTypeBy=undefined&filterTopicBy=5&autorefresh=1>. In provinces where abortion clinics exist, abortions performed in clinics significantly outnumber abortions performed in hospitals. *Id.* Joanna Erdman explains that single-purpose abortion clinics are widely held to offer "more supportive and higher-quality care" compared to hospitals. Erdman, *supra* note 182, at 1095. The fact that some provinces do not have abortion clinics at all (Nunavut, Yukon, Northwest Territories, Prince Edward, Nova Scotia, and Saskatchewan) or refuse to pay for abortions performed in clinics (Nunavut, Yukon, Northwest Territories, Prince Edward, Nova Scotia, New Brunswick, and Saskatchewan) creates a significant financial and geographical barrier for women seeking abortion. Reid, *supra* note 185; see also *Abortion Coverage by Region*, NAT'L ABORTION FED'N CAN., <http://www.nafcanada.org/access-region.html>.

190. For instance, until recently on Prince Edward Island, few requests for abortion referral were approved by the province physicians and most women had to pay out of pocket for abortion services in another province. Reid, *supra* note 185.

191. Only 15.9% of Canadian hospitals provide abortion services. Froc, *supra* note 184, at 434.

192. See *supra* notes 188-189 and accompanying text.

2. Germany

The German example further complicates the debate regarding the benefits of legislative solutions to abortion. In 1974, the German legislature enacted the Abortion Reform Act.¹⁹³ The new, liberalized statute provided that abortion would no longer be punishable if performed by a licensed physician during the first twelve weeks of the pregnancy and with the consent of the pregnant woman, after she had received counseling concerning available assistance for pregnant women, mothers, and children.¹⁹⁴ Three days after the enactment of the law, a petition to the German Constitutional Court challenged its constitutionality on the ground that it violated several provisions of the Basic Law, including its human dignity and right to life clauses. The Court struck down the proposed law and determined that the German state was under an affirmative obligation to protect the constitutionally guaranteed right to life and human dignity of the fetus by criminal means.¹⁹⁵ The Court did not stop at striking down the proposed law, as the Canadian Supreme Court did. Like the U.S. Supreme Court in *Roe v. Wade*, the German Court went on to outline a constitutionally acceptable framework for abortion regulation. Specifically, the Court pointed to four circumstances in which rights and interests of the pregnant woman were worthy of constitutional protection and therefore justified providing some legal access to abortion. These circumstances included medical risk (threats to the life or health of the pregnant woman), criminal risk (when pregnancy resulted from a criminal act), risk of fetal defect (a fetus suffering from severe birth defects), and social risk (situations in which the continuation of the pregnancy would impose on the woman exceptional hardships). The Court explained that in these circumstances it was unreasonable to expect a woman to carry the pregnancy to term. Thus, the 1975 German Court decision was based on a strict, judicially imposed concept of rights that disregarded the resolution of a majoritarian process in the legislature. The German Parliament complied, almost to the letter, with the ruling of the Court, and the revised version of the Abortion Act that passed in 1976 re-criminalized all abortions except the four judicially authorized categories.¹⁹⁶

Interestingly, the German legislation enacted in 1976 in accordance with the Court's guidelines resembled the Israeli abortion legislation formulated a year later. Both laws granted women permission to terminate unwanted pregnancies for reasons of social hardship in addition to the more traditional medical and

193. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 336 (2d ed. 1997).

194. The reformed law also provided that criminal penalties would continue to be enforced, as before, with regard to abortions performed after the third month of pregnancy, except in those instances in which medical, fetal defect, or ethical considerations would justify the termination of the pregnancy. *Id.*

195. 39 BVERFGE 1 (1975) (Ger.), translated in Robert E. Jonas & John D. Gordy, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 JOHN MARSHALL J. PRAC. & PROC. 605 (1976).

196. KOMMERS, *supra* note 193, at 347.

criminal justifications. However, in Israel, where there were no safeguards for a mandatory conception of rights, the legislature soon abolished the socioeconomic clause out of narrow political considerations. In Germany, on the other hand, despite the fact that the Court imposed a much narrower concept of women's rights compared to the original abortion legislation, the final abortion arrangement still secured for women the most important ground for abortion: the socioeconomic ground. Data from the relevant period reveal that 80% of all legal abortions fell into this category.¹⁹⁷ At the same time, even with its social hardship clause, the German law was very narrow and therefore unrealistic in light of women's actual needs. Like the Israeli legislation, it did not work as intended: rates of criminal prosecution were low, and women who were determined to have an abortion could travel to less restrictive jurisdictions.¹⁹⁸

Following German reunification, the abortion issue was revisited. In an attempt to find a middle ground between the conflicting policies of East and West Germany, the first all-German Parliament reached a compromise, passing the Pregnancy and Family Assistance Act by a large majority.¹⁹⁹ The new statute departed from the Constitutional Court's earlier ruling in one crucial respect. It decriminalized abortion in the first twelve weeks of the pregnancy and provided that abortions could be performed during this period upon a woman's request and after compulsory counseling and a three-day waiting period. This law was soon challenged on constitutional grounds. In 1993, the Court issued a second ruling on the proper constitutional boundaries of abortion legislation.²⁰⁰ In its opinion, the Court insisted on the revision of some features of the proposed law to make it more protective of unborn life, focusing especially on the creation of a refined system of affirmative counseling oriented toward preserving the life of the fetus.

While declaring that mandatory counseling that encourages the woman to continue her pregnancy could now substitute for criminal penalties during the first trimester, the Court held that these abortions must remain illegal (although not punishable). It also directed the legislature to adopt measures in all spheres of law to support a woman's decision to favor life over abortion and to ensure that child-rearing does not lead to disadvantages for women. Finally, the Court held that abortions not justified on one of the four permitted grounds should not be covered by the general public health insurance, but clarified that the State could not constitutionally deny welfare assistance to poor women who wanted such abortions but could not afford them. In rejecting the 1992 abortion statute, the Court tossed the ball back to parliament. As in the 1970s, a pro-choice legis-

197. *Id.*

198. *Id.*; Case, *supra* note 153, at 96.

199. KOMMERS, *supra* note 193, at 348.

200. 88 BVERFGE 23 (1993) (Ger.). An official English translation is available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1993/05/fs19930528_2bvf000290en.htm.

lature had to comply with judicially imposed constitutional guidelines that insisted on drawing a different balance between the rights of the woman and the rights of the unborn. A revised bill that provided for compulsory counseling for non-permitted abortions, as outlined by the Constitutional Court, was passed by the German legislature in 1995.²⁰¹

German abortion law is often depicted as a compromise law that was crafted by the legislature and the Court as equal parties to the deliberations. For instance, following the first German Constitutional Court decision, Mary Ann Glendon argued that the German Court, as opposed to the American Supreme Court, "left the task of fashioning abortion regulation basically up to the legislature and the ordinary political process."²⁰² Other commentators analyzing post-unification abortion legislation have similarly referred to "compromise" as a key aspect of the legal and political process that enabled the creation of contemporary abortion legislation in Germany.²⁰³ Indeed, the German Constitutional Court clearly adjusted its second holding on abortion to the needs of post-unification Germany and outlined a constitutional framework for the regulation of abortion that was different from the original outline. Moreover, it can be argued that the ultimate scheme for mandatory counseling that was drafted by the legislature appears to be less vigorous than what was intended by the Court.²⁰⁴ However, a portrayal of the legal developments that led to the formation of abortion law as a "compromise process" between the Court and the legislature undermines the significance of three characteristics of this process.

First, at the end of the day, it was a process in which the German Court overruled a democratic decision reached by a more liberal legislature and ordered the drafting of new abortion legislation based on a judicially imposed conception of constitutional rights. The fact that the legislature carefully followed the instructions of the Court might point to a political culture in which the authority of the Court as the ultimate interpreter of the Basic Law is widely accepted, even when a majoritarian process at the legislature reached a different decision. Second, the ultimate judicial outline for abortion legislation was strictly rights-based in a manner similar to *Roe v. Wade*, though different concepts of rights underlie the two decisions. The primary distinction between the two legal systems is the recognition of fetal life as an independent value worthy of protection under the German constitution. To be clear, the German Court did not refer to the fetus as a person and noted that it does not enjoy the same rights as other human beings.

201. KOMMERS, *supra* note 193, at 355-56.

202. GLENDON, *supra* note 142, at 65.

203. For instance, Ofrit Liviatan characterized legal developments in Germany as reflecting general trends in many other Western European countries in which "legislatures and constitutional courts negotiated over a long period of time and amid great public controversy uneasy compromises." Liviatan, *supra* note 153, at 396; *see also* Case, *supra* note 153.

204. KOMMERS, *supra* note 193, at 355.

This difference allowed the Court to strike a balance between the rights of the fetus and the rights of the pregnant woman.

Finally, what makes the German example attractive in the eyes of many critics of American abortion politics is that abortion legislation in Germany provides funding for most abortions, as well as positive assistance to families and children. Yet this legislative scheme is based on a concept of positive constitutional rights dictated by the German Court. As part of the duty to protect unborn life, the state was required by the Court to protect families and mothers and to address the problems and difficulties that a woman might experience during pregnancy and child-rearing. In addition, in order to provide adequate protection for women's constitutional rights, the State was obliged to provide welfare assistance to poor women who were seeking to end an unwanted pregnancy and could not afford it.²⁰⁵ If public funding is available today for most abortions in Germany and if the State also provides a comprehensive positive network of reproductive support, it is primarily the result of a judicially imposed concept of positive constitutional rights that, in contrast to American constitutional law, interprets constitutional values as imposing positive burdens on the State.

From an Israeli perspective, the German rights discourse and its impact on the final boundaries of legal abortion are particularly revealing. In Israel, the absence of a conception of rights that determines the proper scope of legal abortions contributed to the repeal of the socioeconomic clause, and to the formation of a legal arrangement that is too narrow in light of women's actual reproductive needs. In fact, following the repeal of the socioeconomic provision, Israeli abortion law became narrower than the first constitutional arrangement formed in Germany in the 1970s, which approved pregnancy termination based on harsh social circumstances. German women enjoyed legal access to pregnancy termination based on social grounds as early as the 1970s, despite the German constitutional acknowledgment of the fetus' right to life; in Israel, the dominance of national and religious concerns and the absence of rights-talk led to the formulation of an extremely narrow legal arrangement, which significantly restricted the access of married women to pregnancy termination. In that respect, the constitutional resolution of the abortion issue in Germany—despite its focus on the rights of the fetus—led to the enactment of abortion legislation that better responded to the needs of women than did Israel's conciliatory and rights-free legislative process.

3. *France*

France provides another example that further complicates previous arguments in favor of less rights-talk and more conciliatory deliberation in the legis-

205. *Id.*

lature. In 1975, the French legislature reformed abortion law, approving medically authorized abortions until the tenth week of pregnancy for women in “a state of distress.”²⁰⁶ The French legislature refrained from clear rights-talk and compromised on a vague formulation of “distress” as the only reason for non-medically necessary abortion. This was described as a “humane” solution that in practice would make abortion a readily available procedure for French women.²⁰⁷ The argument was that this formula was a satisfactory compromise because it left the determination as to the existence of distress in the hands of the woman. However, in light of the Israeli experience, it can be assumed that this legal structure encouraged women to lie about their condition and encouraged doctors who were concerned about women’s access to safe abortions not to inquire about women’s true reasons for pregnancy termination.

The Israeli case study demonstrates that legislation that is too narrow in light of women’s reproductive needs and rights ceases to matter practically, and that the actual mechanisms for abortion approval are implemented parallel to the law rather than within it. These insights might suggest that what made abortion a readily available procedure for French women was not the orderly enforcement of the law’s provisions, but rather circumvention routes that evolved in the shadow of the law. Mary Ann Glendon implicitly admitted that this might be the case when she noted that “there are no sanctions against the woman who pretends to be in distress.”²⁰⁸ This more nuanced reading of the reality of abortion access in France after 1975 might help explain more recent events.

In 2014, the French legislature enacted a new piece of abortion legislation that allowed women to have abortions during the first twelve weeks of pregnancy with no questions asked, as part of a sweeping and historic legislative reform meant to increase gender equality in the country.²⁰⁹ This reform supplemented 2013 legislation that required the government to cover the full cost of legal abortions for every woman seeking such services, as well as contraception for adolescent girls.²¹⁰ Both initiatives were presented by the legislature as designed to strengthen reproductive rights and health care. The shift to a clear discourse of rights is apparent in the language of the new legislation. The new abortion law

206. Liviatan, *supra* note 153, at 392. The law, which was to expire after five years, was reenacted with minor changes in 1979 after France’s highest constitutional authority ruled that it did not violate any constitutional texts. See GLENDON, *supra* note 3, at 18.

207. GLENDON, *supra* note 3, at 18; Liviatan, *supra* note 153, at 392.

208. GLENDON, *supra* note 3, at 16-17.

209. Loi 2014-873 du 4 août 2014 pour l’égalité réelle entre les femmes et les hommes [Law 2014-873 of Aug. 4, 2014 For the Real Equality Between Women and Men], Journal Officiel de la République FRANÇAISE [J.O.] [Official Gazette of France], Aug. 4, 2014, p. 12949. For an English translation of the abortion provisions, see THE WORLD’S ABORTION LAWS 2015, CTR. FOR REPRODUCTIVE RTS., <http://worldabortionlaws.com/map/>.

210. Le décret n° 2013-248 du 25 mars 2013 relatif à la participation des assurés prévue à l’article L. 322-3 du code de la sécurité sociale] Decree No. 2013-248 of March 25, 2013, Relating to the Participation of Insured Persons Provided for in Article L. 322-3 of the Social Security Code for Expenses Related to a Voluntary Interruption of Pregnancy and the Acquisition of Contraceptives by Minor, [Journal Officiel de la République Française] [J.O.] [Official Gazette of France], March 25, 2013.

was enacted as part of a comprehensive bill that explicitly strove to promote greater gender equality in the public and private spheres.²¹¹ Under the abortion provisions, a woman's right to abortion on demand is clearly articulated, and there is also some reference to the rights of the unborn. An important legal development that played a role in inspiring this abortion reform was a 2004 decision of the European Court of Human Rights, in which the Court declined to recognize a fetus as a person under the European Convention and refuted the claim that the fetus has a right to life.²¹²

Hence, as opposed to the 1975 French abortion law that avoided rights-talk in facilitating women's access to abortion, France recently embraced a clear rights-talk framework for abortion regulation. This has led to the enactment of comprehensive legislation that not only specifically defines the rights of the woman in addition to the rights of the unborn, but also better responds to women's and men's broader reproductive needs.

CONCLUSION

In 1992, Israel enacted two new "Basic Laws" that address several important human rights guarantees.²¹³ These laws were designed to eventually be codified into a comprehensive bill of rights, and they are currently regarded as Israel's "semi-constitution," granting courts the power to strike down any legislation that violates the basic rights guaranteed by the two Basic Laws. However, according to the Basic Laws themselves, legislation that was in effect before enactment of these laws is immune from any kind of judicial review. This implies that the abortion law enacted in 1977 will remain unaffected by this partial constitutional revolution and by the newly embraced discourse of individual rights. Thus, the historical compromise at the legislature that conceptualized access to abortion in language devoid of any concept of rights affects the lives of Israeli women to this very day.

The problematic implications of this situation are not easily discernible from official data on legal abortion in Israel. At first glance, official statistics tell a relatively optimistic story, depicting Israel as a country with a relatively low number of abortions per capita, although almost all requests for pregnancy terminations are approved by the Pregnancy Termination Committees. However, this Article reveals that Israel's official statistics on legal abortion disguise a re-

211. The law provides protections for domestic abuse victims and supports gender equality in the division of childcare and representation in politics. It also strives to promote gender equality in the workplace by encouraging men to take paternity leave to care for newborns. Law For the Real Equality, *supra* note 209.

212. *Vo v. France*, App. No. 53924/00, 2004-VIII Eur. Ct. H.R. 326.

213. Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 (Isr.); Basic Law: Freedom of Occupation, 5754-1994, SH No. 1454 (Isr.).

ality in which the abortion law itself no longer regulates abortion approval. Access to abortion is, in fact, determined by the law's two enforcement agents—the Pregnancy Termination Committees and the Minister of Health—through law-circumventing mechanisms. These mechanisms guarantee wider access to abortion, especially for married women, but it is an access devoid of dignity. Married women who want to terminate an unintended pregnancy must either lie about the true reasons for requesting pregnancy termination in exchange for a safe legal abortion, or find refuge in a private, unsafe, and costly illegal procedure.

Compared to American women, Israeli women are indeed better off in terms of the availability of public funding for some abortions and the relative ease of obtaining a committee's approval for a legal abortion. In an era in which American women, and especially poor women, still lack easy access to and public funding for pregnancy termination, these practical benefits should not be disregarded. At the same time, the hidden, often unnoticed, and highly gendered costs of the Israeli abortion law provide a valuable starting point from which to debate arguments in favor of legislative solutions to abortion that are not rights-centered. Most importantly, comparative lessons from the Israeli case study as well as from Germany, Canada, and France are particularly useful in drawing attention to the significance of a rights framework for shaping enforceable and just abortion policies. Some of these case studies suggest that judicially imposed, rights-based frameworks for abortion regulation are optimal, as majoritarian processes at the legislative level can result in policies that undermine the rights of disadvantaged groups, such as women. The American experience with abortion regulation exemplifies this insight. Other case studies highlight the prospect of legislative solutions to abortion that are also rights based. All these comparative examples indicate that when abortion rights don't talk, neither gender equality nor gender justice can be fully realized.

